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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1954

MRS. AARON (CELIA) FUNK,
Petitioner in Certiorari,

vs.

SEABOARD AIR LINE RAILWAY COMPANY,
Defendant in Certiorari.

No.

PETITION OF MRS. AARON (CELIA) FUNK FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR FIFTH CIRCUIT

The petition of MRS. AARON (CELIA) FUNK for writ of certiorari to the U. S. Court of Appeals for the Fifth Circuit shows to the Court as follows:

OPINION AND JUDGMENTS OF COURT OF APPEALS

The opinion of the U. S. Court of Appeals for the Fifth Circuit, dated April 30, 1954, and reported in 212 Fed. 2nd 434; its judgment thereon of the same date; and its denial on June 10, 1954, of Petitioner's Petition for Rehearing are attached as Appendix A, B, and C, respectively. They appear in the Record at pages 633-7, 638, and 674 respectively.

GROUNDS OF JURISDICTION OF SUPREME COURT

The decision of the U. S. Court of Appeals for the Fifth Circuit, sought to be reviewed and corrected by writ of certiorari in this case, was issued and entered on April 30, 1954.

The order denying Petitioner's Petition for Rehearing in said Court was issued and entered under date of June 10, 1954.

The statutory provision conferring upon this Court jurisdiction to review the said judgment of the U. S. Court of Appeals for the Fifth Circuit by writ of certiorari is set forth in Section 1254(1) of 28 U. S. C. A., as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

IMPORTANT QUESTIONS PRESENTED FOR REVIEW

I.

The Court of Appeals for the Fifth Circuit in this case has rendered a decision in conflict with that of the Court of Appeals for the Eighth Circuit in the case of *Thomson* vs. *Anderson,* 138 Fed. 2nd 272, and has decided an important State question in a way in conflict with applicable State law, in the following particulars:

The Court of Appeals for the Eighth Circuit held in the above stated case in a death action based upon the theory that the train was driven past the station at such speed that suction of wind caused deceased to lose his balance and fall under the train, that the negligence of the railroad and contributory negligence of the deceased were questions for the jury; that it was clear from all the evidence that a fast moving train causes a disturbance in the air as it passes; and that in cases of injury to persons lawfully on station platforms, as a result of suction or wind from a rapidly passing train, the courts have generally held that the questions of negligence and contributory negligence were for the jury, and have assumed that recovery for such an injury is

not precluded on the ground that it should not reasonably be anticipated.

In the case at bar, the Court of Appeals for the Fifth Circuit holds on this point as follows:

> "The appellant also claims that the court's charge to the jury on the issue of suction was equivalent to charging that there could be no recovery based on suction. The charge, in substance, was that if under the operation of natural laws the Appellee should have anticipated that the Appellant's son would probably be sucked into the train because of an existing condition, not due to any negligence on the part of Appellee, then the decedent would likewise be bound to anticipate the same result; but that, if the happening was unusual and extraordinary, and not brought about by any negligence of the railroad, and the Appellant's son could not have anticipated such result, then neither could the railroad be expected to anticipate it. We think these instructions to the jury were not subject to the objections urged against them."

The above quoted charge was also in direct conflict with the Georgia law on a very important State question as shown by the following authorities:

Western & Atlantic Ry. Co. vs. *Wright,* 79 Ga. App. 733, 64 S. E. 2nd 655;

Atlantic & B. Ry. Co. vs. *Owens,* 123 Ga. 393, 51 S. E. 404;

Coffer et al vs. *Bradshaw et al,* 46 Ga. App. 143, 167 S. E. 119;

Collier vs. *Pollard,* 60 Ga. App. 105, 2 S. E. 2nd 821; and

Georgia Code Sections 94-1108 and 105-401.

In this case the uncontradicted evidence shows that petitioner's son was upon the platform where he was invited by Defendant to be in meeting its train, and about two feet from the edge of the platform, at the time he was hit by its train and fatally injured; and that there was no separation of the platform from the roadbed of the main track and no

railings or curbs or marks or anything else to indicate that any part of said platform was dangerous.

II.

The Court of Appeals for the Fifth Circuit in this case has decided an important State question in a way in conflict with applicable State law, in upholding a charge of the U. S. District Court to the jury to the effect that the employees of the Defendant, in charge of the operation of its train, had a right to assume that Petitioner's son was a rational human being and would exercise reasonable care for his own protection while standing or walking along the walkway or platform upon which he was invited by Defendant, as its train passed by, and that there was no legal duty on the part of the servants of the defendant in charge of its train to anticipate that Petitioner's son would, if he was in an apparent place of safety on the walkway or platform beside the track, move in a moment or so to an unsafe place on the platform nearer the train; where the uncontradicted evidence shows that Petitioner's son was upon the platform erected and maintained by the Defendant for its invitees in meeting or boarding or alighting from its trains, at the time he was hit by its train and fatally injured; where the overhang of the Defendant's said train traversed 26 or 27 inches of the surface of said platform, and where there was no separation of the platform from the roadbed of the main track, and where there were no railings or curbs or marks or anything else to indicate that any part of said platform was dangerous.

This charge was entirely inapplicable to Petitioner under the facts and circumstances in this case and was fatally prejudicial to her. It was in direct conflict with the applicable and controlling law of Georgia as set forth in the cases of:

Atlantic & B. Ry. Co. vs. *Owens,* 123 Ga. 393, 51 S. E. 404;

Coffer et al vs. *Bradshaw et al,* 46 Ga. App. 143, 167 S. E. 119;

Collier vs. *Pollard,* 60 Ga. App. 105, 2 S. E. 2nd 821;
and
Georgia Code Sections 94-1108 and 105-401;

providing in substance that one who expressly or impliedly invites another upon his premises is bound to see that they are in such condition that the person invited may approach and remain thereon in safety; that a railroad company owes a duty to keep its passenger station in SAFE condition not only to those who come there for the purpose of embarking upon trains, or those who use the station in alighting from trains, but also to those who resort there for the purpose of meeting passengers; and that it was the duty of the defendant to protect Petitioner's son, as its invitee upon its platform, from traps, pitfalls, and hidden dangers, and to guard, cover or protect dangercus places or instrumentalities for his safety; and that where damages are proved to have resulted by the operation of the cars of a railroad company, a presumption of negligence arises against the railroad company as to each of the negligent acts charged in the petition, and the plaintiff is entitled to recover the damages proved on such a prima facie case, UNLESS THE DEFENDANT SHALL CARRY THE BURDEN OF SHOWING THAT THE DAMAGE WAS DONE BY THE CONSENT OF THE INJURED PERSON, OR WAS CAUSED BY HIS NEGLIGENCE, OR THAT THE DEFENDANT WAS NOT ACTUALLY GUILTY OF THE NEGLIGENCE CHARGED, OR, IF SO, THE INJURED PERSON COULD HAVE AVOIDED ITS CONSEQUENCES BY THE EXERCISE OF ORDINARY CARE AFTER IT HAD OR SHOULD HAVE BECOME APPARENT, AND THAT EVEN IF THE INJURED PERSON WAS NEGLIGENT AND SAID NEGLIGENCE CONTRIBUTED IN SOME DEGREE LESS THAN THAT OF THE DEFENDANT, A RECOVERY WOULD STILL BE AUTHORIZED IN AN AMOUNT DIMINISHED IN PROPORTION TO SUCH CONTRIBUTORY NEGLIGENCE.

III.

The Court of Appeals in this case has decided a Federal question in a way in conflict with the applicable decisions of this Court in the cases of *Universal Oil Products Co.* vs. *Root Refining Co.*, 328 U. S. 473, 66 S. Ct. 1176, and *Hazel-Atlas Glass Co.* vs. *Hartford Empire Co.*, 322 U. S. 238, 64 S. Ct. 996, in that the said Court of Appeals affirmed the Federal District Court in not granting the prayers of Petitioner's Motion under Rule 60(b) of the Federal Rules of Civil Procedure to relieve her of its order of January 21, 1953, overruling her Motion for New Trial, because her said verified Motion under Rule 60(b), supported by an accompanying affidavit, showed that at least one or more of the jurors trying her case admitted visiting the scene at Emory University station where her son was killed by the train of the Defendant, for the purpose of making a personal inspection of said scene and to make certain tests for use and consideration on the trial of the case and in arriving at a verdict; that this visit was made without her knowledge or consent or that of the court or of her counsel, and without their presence or opportunity to be present; and because her said Motion under Rule 60(b) and accompanying affidavit show that at least several of the jurors were told or given to understand by some unknown person or persons, during the trial, that the Defendant had made one or more offers of settlement to Petitioner, which had been rejected by her, etc. This question is presented in full in the record at pages 594-602.

In the case of *Hazel-Atlas Glass Company* vs. *Hartford Empire Co.*, supra, this Court held that the Circuit Court in that case not only had the power but also MANDATORY DUTY TO VACATE A JUDGMENT SECURED THROUGH FRAUD UPON THE COURT. It held that every element of the fraud there disclosed demanded the exercise of the historic power of equity to set aside fraudulently begotten judgments. It further held:

> "THIS MATTER DOES NOT CONCERN ONLY PRIVATE PARTIES. THERE ARE ISSUES OF GREAT MOMENT TO THE PUBLIC ... FURTHERMORE, TAMPERING WITH THE ADMINISTRATION OF JUSTICE IN THE MANNER INDISPUTABLY SHOWN HERE INVOLVES FAR MORE THAN AN INJURY TO A SINGLE LITIGANT. IT IS A WRONG AGAINST THE INSTITUTIONS SET UP TO PROTECT AND SAFEGUARD THE PUBLIC, INSTITUTIONS IN WHICH FRAUD CANNOT COMPLACENTLY BE TOLERATED CONSISTENTLY WITH THE GOOD ORDER OF SOCIETY."

In the case of *Universal Oil Products Co.* vs. *Root Refining Co.*, supra, this Court cited with approval and followed *Hazel-Atlas Glass Co.* vs. *Hartford Empire Co.*, supra, and further held that,

> "The power to unearth such a fraud is the power to unearth it effectively"; that, "Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation"; and that, "No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that THE VERY TEMPLE OF JUSTICE HAS BEEN DEFILED, the entire cost of the proceedings could justly be assessed against the guilty parties."

In the case at bar, the Federal District Judge took no action whatever to unearth said serious fraud charged in Petitioner's Verified Motion under Rule 60(b) and accompanying affidavit. The charge of fraud perpetrated upon the Court in this case, as shown by prima facie proof, is especially serious because Petitioner's case against the Defendant was based upon the negligent homicide of her fine minor son by Defendant, and the jury was sworn to decide the case according to the opinion entertained by the jurors of the evidence allowed in the case by the Trial Court and the law applicable thereto, as given them in charge by the Trial Judge.

IV.

Petitioner offered evidence from Witnesses Cohen, Halpern, and Bernstein by depositions as to the effect of the impact of the train against her son, the manner in which he was injured, the effect of the injuries, and the cause of his death. Although this evidence constituted a very material part of Petitioner's case, the Trial Court not only refused to allow any of said evidence to go to the jury, but also reprimanded her attorney for offering it and made the following statements of a very highly prejudicial nature to Petitioner, all in the presence and hearing of the jury:

> " . . . the reason the Court is excluding that is because counsel for the defendant has stated in open court that he admits that the cause of the death was the occasion under investigation. NOW YOU REPEATEDLY IN THE PRESENCE OF THE JURY UNDERTAKE TO PROVE THE EXTENT OF HIS INJURIES. THIS DEPOSITION SPEAKS OF HIS GASPING FOR BREATH AND THE POOL OF BLOOD THAT ACCUMULATED UNDER HIS HEAD. THAT IS INCLINED TO BE INFLAMMATORY, and when it is objected to as being, as not illustrating any issue in the case after the counsel for the defendant has stated in open court that they admit that the injuries received there on that day were the cause of his death, then I think that the objections are good, that it is inflammatory, THAT IT TENDS SIMPLY TO MAKE THE JURY TRYING THE CASE VISUALIZE THE HORRIBLE EXTENT OF THE INJURIES, AND THAT IT REALLY ILLUSTRATES NO ISSUE THAT IS IN THE CASE. NOW, I THINK YOU HAVE UNDERSTOOD THE REASON FOR THE RULING AT ALL TIMES, AND I HAVE RULED THAT REPEATEDLY. I THINK IT IS THE LAW, BUT WHETHER IT IS THE LAW OR NOT, I HAVE RULED THAT IT IS, AND I WILL ASK YOU TO RESPECT IT IN THE FUTURE."

The said evidence is presented in detail together with the contentions of Petitioner's counsel and rulings of the Court

pertaining thereto, in the Record at pages 610-614 under Point VII.

The Court's attention was invited to the fact that the Defendant had expressly denied paragraph 5 of the complaint alleging that Petitioner's son was killed by the Silver Comet train of the Defendant on June 2, 1950, at its railroad station at Emory University, Ga.

There were other questions and answers of a similar nature, and counsel for Petitioner inquired of the Court whether he could read to the jury said questions and answers from the depositions of said witnesses. The Trial Judge then stated he had only ruled on the ones that had been read and could not rule on the others until read. Petitioner's counsel then explained he was inquiring what to do in order not to breach the ruling of the court. He desired to prevent a repetition of the statements by the Court quoted in this ground of a highly prejudicial nature to Petitioner or the making of similar statements prejudicial to her. The Court then had the jury retire from the court room and allowed Petitioner's counsel, outside the presence and hearing of the jury, to read into the record the questions and answers which he deemed admissible and to state why he considered said evidence admissible.

Petitioner contended that any evidence showing that her son was negligently hit by the Defendant train, including blood caused by the blow, the effect of the negligent blow upon him, the cause of his death, and all the surrounding facts and circumstances were a part of her case; that the fact that the said material evidence might influence the jury against Defendant could not be complained of by it because the said tragedy was caused by the negligence of the Defendant, as contended by Petitioner and as supported by the evidence, and that Petitioner had a right to argument by her counsel of said evidence to the jury. She contended at the time and still contends that every part of said evi-

dence rejected by the trial court was material to the issues involved and admissible in this case; that the said evidence would have benefited her in the consideration of the jury; that its exclusion was very harmful to her; that the reprimand by the Trial Court of her counsel and its comments pertaining to said evidence, in the presence and hearing of the jury, were each and all unwarranted, illegal, and highly prejudicial to her in the consideration of the jury. She contended and still contends that the said rulings, reprimand, and comments by the trial court, as affirmed by the Court of Appeals, deprived her of a fair and impartial trial by the jury, of a jury trial guaranteed to her by Amendment VII of the U. S. Constitution, and of her property to the extent of the amount sued for, without due process of law in violation of Amendment V of the U. S. Constitution.

V.

During the cross examination by Petitioner's counsel of Will Garlington, the Defendant's fireman on this train and its witness, the Trial Judge refused to require said witness to answer material and proper questions, reprimanded Petitioner's counsel for asking said proper questions, and made comments of a prejudicial nature to her, all in the presence and hearing of the jury, as set forth in detail in Point VIII (R. 614-17).

For instance, Petitioner's counsel asked this witness several times, without securing a responsive answer, as to whether his testimony as to when the engineer applied his brakes and how many times he applied them on the occasion in question was based upon what the engineer customarily did or upon his independent recollection. The last time this question was asked said witness, he stated:

> "We have to do it to stop the train. THAT'S ALL I'M GOING TO TELL YOU. That's all I know. I just know he put the brakes on, you know, the average way, just like he always brake, Judge, and by him, by me

taking so particular because he hit the boy, I don't know, but that's the usual stop, and the way he brake ALL THE TIME."

The Trial Court then stated, "All right, I think the jury understands the witness."

This witness testified:

"I never been in BIG court like this, Judge, before, and I was scared to come in here, too, and I ain't going to tell nothing but the truth, Judge."

The Trial Court then stated:

"You seem to be doing all right."

The witness then stated:

"That's right. Thank you, sir."

All this took place in the presence and hearing of the jury in open court.

The witness testified on cross examination that when he first saw Petitioner's son, the latter was on the walkway at said station about 50 feet from the approaching train and walking toward or meeting the train; that he was walking fast and walked about ten steps from that time until the train struck him. He had testified that the train was running about 25 miles an hour when it struck Vernon Funk. He was asked how far the train went while Vernon was walking said ten steps or from the time he first saw Vernon 50 feet away until the train hit him. The witness refused to answer this question. Petitioner's counsel thereupon asked said witness, "Then, do I understand you cannot tell the jury how far the Diesel went, in feet?" The Trial Court then stated, "Yes, sir, I think you are safe in assuming that he cannot. YOU HAVE ASKED HIM THAT ABOUT FIFTEEN TIMES." The witness then made the following boastful speech in the presence and hearing of the jury:

"I'm telling the truth, and don't want to tell him no story, and I ain't gwine tell him none, and I ain't going to tell no story for nobody, I been here this long with a good record, Judge. I want to leave the same way. I

> been with the company fifty years, I got a retirement button, fifty years service. If I talk too much I might say something I ought not to say. I don't want to tell no story and I ain't gwine tell none, neither."

Reference to the testimony of this witness (R. 501-19) will show that his answers were contradictory in many particulars and in others very evasive; that he frequently interrupted the cross examination by injecting improper and argumentative statements in behalf of his character, and by bragging about his record with the Defendant railroad; that he refused to answer simple questions where correct answers would have been unfavorable to Defendant and promptly answered similar questions when the answers were in favor of the Defendant; that he insisted on making speeches to the jury and to the Presiding Judge instead of answering in a direct and proper manner the material and proper questions propounded to him on cross examination.

The refusal of the Trial Judge to require this witness to answer material and proper questions, his criticism of Petitioner's counsel for asking such questions, and his complimenting the witness, all in the presence and hearing of the jury, were very prejudicial to Petitioner, especially in view of the fact that this witness was the fireman on the train which hit Vernon and the only witness of the Defendant who claimed he saw the impact and his evidence as to how Vernon was hit was in conflict with the testimony of all the other witnesses. In fact, the Court of Appeals based its decision upon his testimony in stating that Vernon was walking toward the approaching train with a suitcase, and that, "He continued to walk along side of the track on which the train was approaching, SWINGING THE LITTLE SUITCASE, and as he tried to go between the track and the line of people that were on the walkway, the hand bag was hit by the lower right front side of the approaching Diesel engine, about five or six feet in front of the ladder that was attached to said Diesel, which swung him around and his head hit a bolt that fastened the ladder to the side of the Diesel."

VI.

The Trial Court allowed Miss Maurita Sutton, witness for the Defendant, to give certain HEARSAY testimony, over the objection of Petitioner's counsel, to the effect that some of the fraternity mates of Vernon Funk told "him to move away," as they were laughing and joking. She stated she did not know the names of said persons or the name of any one of them. She could not describe the appearance of any of them. She said, "There was a chorus of all these boys, 'You had better move back.' " SHE SAID, "That occurred at Emory station on the night we got on the train," but THAT SHE DIDN'T "KNOW WHAT TIME THAT NIGHT." She first testified that she was "in back of Vernon." A few minutes later she testified he was behind her and that he followed behind her and the boy she was with.

This question is presented in Point IX (R. 617-18).

The Court of Appeals adopted this hearsay, argumentative, and incompetent testimony in affirming the Trial Court, in the following language:

> "Just before the accident occurred, some of decedent's fraternity brothers warned him to 'move back,' to which he replied: 'Oh, nothing at all will happen to me.' "

VII.

Petitioner contends the Court of Appeals in this case has so far departed from the usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, in the particulars set forth in the preceding questions and in the Points on Appeal (R. 606-22), and her Petition for Rehearing, (R. 642-73) as to call for an exercise of this Court's power of supervision.

VIII.

Petitioner contends that the Court of Appeals in this case has deprived her, a citizen of the United States, of her right

to a jury trial, properly and timely demanded by her, under Amendment VII of the U. S. Constitution, in the particulars specified in the foregoing questions and Points on Appeal (R. 606-22), and in her Petition for Rehearing. (R. 642-73.)

IX.

Petitioner contends that the Court of Appeals in this case has deprived her of due process of law guaranteed to her by Amendment V of the U. S. Constitution, in the particulars shown in the preceding questions and Points on Appeal (R. 606-22), and as indicated in her Petition for Rehearing in said Court, thereby depriving her, a citizen of the United States, of her property to the extent of $250,000.00, in violation of said Amendment of the U. S. Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) *Amendment V of the U. S. Constitution,* providing in part as follows:

> "No person shall . . . be deprived of life, liberty or property, without due process of law."

(2) *Amendment VII of the U. S. Constitution,* providing as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

(3) *1933 Georgia Code Section 105-1301,* providing as follows:

> "The word 'homicide' as used in this Chapter shall include all cases where the death of a human being results from a crime or from criminal or other negligence."

(4) *1933 Georgia Code Section 105-1307,* providing in part as follows:

"A mother, . . . may recover for the homicide of a child, minor or sui juris, upon whom she . . . is dependent, or who contributes to her . . . support . . . The mother . . . shall be entitled to recover the full value of the life of such child."

(5) *1933 Georgia Code Section 105-1308,* providing as follows:

"The full value of the life of the decedent, as shown by the evidence, is the full value of the life of the decedent without deduction for necessary or other personal expenses of the decedent had he lived."

(6) *1933 Georgia Code Section 105-401,* providing as follows:

"Where the owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries occasioned by his failure to exercise ordinary care in keeping the premises and approaches safe."

(7) *1933 Georgia Code Section 94-1108,* providing as follows:

"In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such companies shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injury."

STATEMENT OF CASE

Petitioner filed suit against the Defendant railroad in the State Superior Court of DeKalb County, Georgia, in the amount of $250,000.00 for the alleged wrongful and negligent killing of her 18 year-old son, Vernon Funk, on June 2, 1950, at its station at Emory University, Georgia. The suit was transferred by the Defendant to the U. S. District Court for the Northern District of Georgia, on the ground of diverse citizenship of Defendant. The case was tried before

Presiding Judge Boyd Sloan, of said Court, and a jury. Petitioner presented evidence proving the following facts:

Vernon Funk, Petitioner's 18 year-old son, was a premedical student at Emory University and had just completed his sophomore year. Dean Rece of the University testified he was a young man of promise and very attractive, with a sound character and personality (R. 200). He was normal, healthy, and ablebodied before he was hit and killed by the Defendant. He rendered valuable services to Petitioner, in the particulars set out in her petition, and his services were worth at least $40.00 to $50.00 a week. She relied and depended upon him more and more as he became older and more experienced, and his services had become indispensable to her before he was killed by the Defendant. He was single and had a reasonably expectancy in life of approximately 53 years or more.

On June 2, 1950, Petitioner's son, Vernon, went to Emory University railroad station of the Defendant to see friends board its streamliner train known as the Silver Comet. The train was lengthy and came into the Emory University station at a rate of speed of approximately 35 to 40 miles per hour. The Defendant had erected and was maintaining an elevated platform of cinders and other hard substances at its station at Emory University, Georgia, along the south side of its main track and between it and the switch or spur track, for a distance of approximately 540 feet, east and west, for the use of Defendant's passengers and its other invitees. The platform was about 5½ feet in width from the ends of the cross ties of its main track on the north to the ends of the cross ties of the side or spur track on the south. The portion of the platform next to the main track was level with the cross ties of said track, but it sloped or dropped off two inches per foot from the center toward the north rail of the side track. There were no separations or marks or curbs or railings or anything else to show that any part of said platform was unsafe for the use of its said in-

vitees. The platform and said tracks were on a sharp curve, and by reason thereof, the main track was banked to permit high speed and to prevent derailing. Said curve and bank caused the top of the train to lean to the north and the bottom part and ends of the cars to lean or extend to the south to the extent of approximately four inches in the form of an arc over the platform (R. 255-6).

Vernon was located on said platform about 105 feet from the west end of it and in the center of the curve and on the only level walking space between the ridge in the center of the platform and its north edge, or about two or three feet from the said north edge.

Professor Harrelson of Georgia Tech, a mechanical and safety engineer and witness for Petitioner, made the measurements as to the above distances and dimensions. He also measured the overhang of the train which hit and killed Vernon, and found that the said overhang traversed 26 or 27 inches (R. 283) of the surface of the platform from the ends of the cross ties of the main track. He further found that there were only 14 or 15 inches of level walking space on the platform, and that it would have been necessary for a person to stand more than two feet and two inches away from the edge of the north side of the platform to keep from being in the path of the train's overhang.

As the train came rapidly around said banked curve and alongside said platform, Vernon was hit and fatally injured by the overhang of the side of the locomotive or cars.

Edwin Halpern (R. 40-69) testified that the train came into the station at the rate of speed of about 40 miles an hour; that Vernon was standing still in a small group with his shoulders forward and his head bent down and his feet about two or three feet, or a little further, from the main track; that he (Halpern) felt the wind of hot air and cinders as the train came in, and moved his suitcase toward the spur track; that the wind swirled around and came back toward

the train. He said Vernon stooped over as if he was trying to avoid the rush of hot air and cinders.

Professor Harrelson testified, in substance, that Vernon could have been within the 26 or 27 inches of the space or surface of the platform traversed by the overhang of the train and hit for said reason, or he could have been drawn into the side of the train by suction, vibration, and optical illusion, as the train passed and the overhang traversed a portion of the platform (R. 291-4).

The platform was erected by the Defendant in 1917, and the only changes made in it from that time until June 2, 1950, when Vernon was killed, were of a minor nature, such as increasing the length and surfacing as needed (R. 13-16). Professor Harrelson testified that the platform, as erected and maintained by Defendant, was not based upon sound or accepted engineering and construction principles, and that such principles required a level platform, preferably of cement, with a cement outer border or curb with proper distance of safety between any moving object that might be passing that particular curb. He said there should be a clearance of at least two or three inches beyond any object that might pass by that concrete curb (R. 284-6 and 317-8). He said there should be a safety zone of at least six to eight feet in width of the platform that would not be obstructed by any passing object and to accommodate the crowds at said station. He said there were probably 100 to 150 people at the station when he made his tests (R. 288).

He said he clocked the speed of the train on arrival at said station on six different occasions to get the average speed; that the lowest speed was 43½ miles per hour, and the highest was 45½ miles per hour (R. 261).

Mr. Ray Walker, agent of the Defendant at its station on the day of the occurrence, estimated the rate of speed of the train to be 25 to 30 miles an hour. (R. 426). He also said there were "a good hundred or more" people at the station

that evening meeting the train, and that it "looked like everybody was down there" on this platform where Vernon was located (R. 427).

Petitioner contended and still contends that by reason of the narrowness of the platform, the congestion caused by the presence of over 100 invitees thereon, and the fact that it had been erected by the Defendant in the year 1917 (with only minor changes, such as increasing the length and surfacing as needed), with no railings or curbs or marks or separations to indicate that any portion of the platform was dangerous, A VERY HAZARDOUS CONDITION WAS CREATED BY THE DEFENDANT IN THE NATURE OF A PITFALL AND MANTRAP AND DEATHTRAP.

The expert witnesses of the Defendant railroad testified in part as follows relative to the principle of suction:

Professor R. S. Hartenberg said that a person a foot and a half to three feet away from a train passing him at the rate of 30 to 40 miles per hour would certainly feel the presence of an air current, and as to the vacant space underneath the cars as they go by, there is a lot of churned up air that is moving along with the train (R. 330-364).

Professor D. W. Dutton testified that if Vernon had been separated from the rest of the people and his body was toward the train and he was stooped over in a crouched position as if to protect himself from air currents, on the walkway around two feet from the ends of the cross ties on the south side of the main track, that in his opinion Vernon would have been subjected to the wind velocity moving in the same direction the train was moving (R. 364-377).

Professor D. R. McMillan testified that the air currents are predominant in the direction that the train goes and are stronger the faster the train is going, and that the air is in turbulent motion in the space under the train (R. 377-379).

The trial resulted in a verdict and judgment for the De-

fendant railroad. Petitioner moved for a new trial. This motion was denied.

Petitioner later filed a verified Motion under Rule 60(b) of the Federal Rules of Civil Procedure (with an affidavit in support thereof) to relieve her of the order of the District Judge denying her Motion for New Trial. Her said verified Motion and accompanying affidavit showed in substance that at least one or more of the jurors trying her case admitted visiting the scene at Emory University station where the homicide occurred, for the purpose of making a personal inspection of said scene and to make certain tests for use and consideration on the trial, and in arriving at a verdict, and that this visit was made without authority of the court and contrary to its general instructions. The said verified Motion and accompanying affidavit further showed that at least several of the jurors trying her case were told by some unknown person or persons, during the trial, that the Defendant had made one or more offers of settlement to Petitioner, which she rejected (although no such offers were ever received or rejected); that such evidence would not have been admissible before the jury if presented; that the said false information, illegally and improperly presented to the jury, without the knowledge or consent of the court and contrary to the rules of evidence, was highly prejudicial to her and deprived her of a fair and impartial trial by a fair and impartial jury upon the legal evidence in the case and under the applicable law.

Petitioner prayed in said Motion that she be relieved of the judgment denying her Motion for New Trial; that she be granted a New Trial for the reasons set forth; that her counsel be permitted to argue the Motion orally as well as by written briefs; that she be permitted to present oral testimony in open court on said hearing and any additional affidavits she might be able to obtain in support of it; that her counsel be allowed to examine in open court each of the jurors separately and to present oral testimony from any

other witnesses which she might desire to offer on said hearing; that the District Court take such precautions as it deemed proper under all the facts and circumstances and the applicable law to protect Petitioner and to insure a fair and impartial trial to her by a fair and impartial jury upon the legal evidence in the case, and to rectify the injustice done her in the verdict rendered against her under the circumstances and illegal and irregular occurrences of a prejudicial nature to her, as set forth in said Motion and accompanying affidavit.

Petitioner's counsel stated in their written brief in support of said Motion under Rule 60(b) that they stood ready and willing to serve the Trial Court in every legal and proper manner in the conduct of a full and fair investigation concerning the alleged fraud and improper practices inflicted upon the Court and Petitioner in this case; that they believed such an investigation was imperative in the public interest, and that each and all of jurors and all of the witnesses having any knowledge of the matters referred to in Petitioner's said Motion should be examined in open court separately.

The District Judge denied every one of the prayers in Petitioner's said Motion, ignored said offer of her counsel, and overruled the Motion.

Petitioner appealed to the U. S. Court of Appeals for the Fifth Circuit from the verdict and judgment of the District Court for the Defendant, and from the order of the District Judge denying her Motion under Rule 60(b). The Court of Appeals affirmed the District Court in its decision and opinion of April 30, 1954. 212 Fed. 2nd 434.

ARGUMENT AND AUTHORITIES RELIED ON FOR ALLOWANCE OF WRIT

I.

The first question speaks for itself. It is based upon the

conflict between the decision of the Court of Appeals for the Fifth Circuit in this case and that of the Court of Appeals for the Eighth Circuit in the case of *Thomson* vs. *Anderson*, 138 Fed. 2nd 272, and also a conflict on an important State question with the applicable State law.

The facts in the case at bar and in that of *Thomson* vs. *Anderson*, supra, are very similar. The facts in favor of the Plaintiff are even stronger in the former than in the latter. The platform was of cinders and gravel in the Thomson case and held in place at the north 38¼ inches from the track by a wooden curb thirteen inches high. It was eleven feet eight inches wide between the station and the curb, except that it narrowed to nine feet six inches about the middle of the building. The decedent's sister testified that he stood about four or four and a half feet from the north edge of the platform. The engineer, fireman, and other employees of the railroad testified that after the train stopped they found fresh blood on the south end of the pilot beam on the FRONT of the locomotive. The fireman testified that when he saw the decedent, the latter was quite close to the track with his arm extending over the curb and his feet about two or three feet south of the curb. The engineer testified that the decedent was flagging the train and was too close to the track to clear if he didn't get off, and that he didn't know where the decedent's feet were, but that his head and body were leaning over. It appears that the decedent and his sister were the only persons on the platform. The evidence with reference to suction was very similar to that in the case at bar.

In the instant case, the platform was only five and one-half feet wide, was built of cinders and other had substances, was rough and uneven, dropped two inches per foot from the ridge in the center to the side track, and 26 or 27 inches of the surface of it was traversed by the overhang of the train on the main track. There were only fourteen or fifteen inches of clear level surface of the platform upon which to walk

from the point at which the overhang of the train came. The decedent was on the only level portion of the platform between the ridge in the center and the north edge next to the ends of the cross ties of the main track. There were no marks or curbs or railings or separations or anything else to indicate that any part of the platform was unsafe or traversed by any portion of the train. The witnesses of the Defendant in this case admitted that the side (and not the FRONT) of one of the Diesel units struck the decedent, whereas in the case of *Thomson* vs. *Anderson,* supra, the railroad contended that the front of the locomotive struck the decedent, and that there was blood on the front beam where the impact occurred.

The facts and circumstances revealed by the Record in this case, pertaining to the matter of suction, as set forth briefly above, presented beyond any doubt whatever questions of fact for determination of the jury, according to the controlling law of Georgia, as shown by the case of *Western & Atlantic Ry. Co.* vs. *Wright,* 79 Ga. App. 733, 64 S. E. 2nd 655. The charge requested by Petitioner from that case was given to the jury, but it was entirely negatived by the erroneous charge complained of under this question. The said charge is also contrary to the decision of this court in *Warner* vs. *Baltimore & O. R. Co.,* 168 U. S. 339, 18 S. Ct. 68. As pointed out in the case of *Strange* vs. *Boatright,* 33 Ga. App. 108, 125 S. E. 721:

> "The jury cannot be expected to select one part of a charge to the exclusion of another, nor to decide between conflicts therein, nor to determine whether one part cures a previous error, without having their attention specially called thereto, and being instructed accordingly."

Professor Harrelson testified positively in this case that Petitioner's son could have been sucked into the train from the point on the platform where he was standing under the circumstances presented by the evidence (R. 291-4).

The Court of Appeals in this case cites the Georgia decisions of *Southern Railway Company* vs. *Young,* 20 Ga. App. 362, 93 S. E. 51, and *Moore* vs. *Seaboard Air Line R. Co.,* 30 Ga. App. 466, 118 S. E. 471, relied upon by Defendant, in support of said charge. These cases have no application whatever to the one at bar. The facts in them are entirely different from the facts in this case. In the case of *Southern Railway Co.* vs. *Young,* supra, the Court states that Plaintiff was not an invitee of the railroad, but was walking along the side of the railroad track, so close that he was struck and injured by the passing train, without being prevented by an intervening cause from placing himself at a greater distance from the track and in a place of safety. The Court also stated in that case that the Plaintiff did not allege the path the public used and along which he was walking was not a safe place if properly used or that it was not wide enough for him to have placed himself in perfect safety by stepping away from the track of the oncoming train, etc. In the case at bar, Petitioner alleged and proved beyond the shadow of a doubt that the platform upon which her son was invited was inherently dangerous, and that he, nevertheless, was invited upon the same by Defendant, and was on it at the time he was killed by Defendant's train. As shown by the cases of *Coffer et al.* vs. *Bradshaw et al.,* 46 Ga. App. 143, 167 S. E. 119; *Atlantic & B. Ry. Co.* vs. *Owens,* 123 Ga. 393, 51 S. E. 404; and *Rothberg et al.* vs. *Bradley,* 85 Ga. App. 477, 69 S. E. 2nd 293, PETITIONER'S SON HAD A RIGHT TO ASSUME THAT THE ENTIRE PLATFORM HE WAS INVITED TO USE WAS SAFE FOR SAID USE.

In the case of *Moore* vs. *Seaboard Air Line R. Co.,* supra, The Court of Appeals of Georgia states that the Plaintiff voluntarily WENT UPON THE TRACK OF THE RAILROAD IN FRONT OF AN APPROACHING TRAIN for the purpose of flagging and boarding the train, and, by reason of miscalculating the speed of the train because of

being in front of it, although he had observed its approach for a distance of more than 400 yards, and though aware that his signals were ignored, REMAINED UPON THE TRACK UNTIL THE TRAIN STRUCK AND KILLED HIM.

The charge excepted to under this point was erroneous and fatally prejudicial to Petitioner because it had the effect of withdrawing entirely from the consideration of the jury the question of suction or vacuum as applied to her son under the facts and circumstances of the case, and thus arbitrarily deprived her of her right to have this question of fact determined by the jury under proper instructions from the Court. The Trial Judge in this charge decided himself all questions of fact, pertaining to the alleged suction, under the circumstances stated, adversely to Petitioner, thereby usurping the exclusive function of the jury and depriving Petitioner of the jury trial guaranteed to her under Amendment VII of the U. S. Constitution.

II.

The second question also speaks for itself, and shows that the Court of Appeals for the Fifth Circuit in this case has decided an important State question in a way in conflict with the applicable State law, in the particulars therein set forth. The charge excepted to in said point was practically equivalent to the direction of a verdict for the Defendant and is in direct conflict with the controlling Georgia authorities cited under question No. II.

The narrowness of the platform in this case, the congestion thereon caused by the presence of over 100 invitees, the fact that the platform had been erected by the Defendant in the year 1917 with no change except minor ones, such as lengthening and adding surfacing as needed, the fact that at least 26 or 27 inches of the surface of the platform was traversed by the overhang of the train, and there were

no railings or curbs or separations or marks to indicate said fact or that any portion of the platform was dangerous or unsafe for use by said invitees, created a very hazardous condition in the nature of a pitfall or mantrap or deathtrap.

The Court of Appeals cites the cases of *Foreman* vs. *Texas & N. O. R. R. Co.*, 204 F. 2nd 79, and *Edwards* vs. *Atlanta, Birmingham & Coast R. Co.*, 63 Ga. App. 212, relied upon by Defendant, in support of said erroneous charge. Reference to said cases will show they have no application whatever to this case. In the Foreman case, the decedent was a section foreman of the railroad and was hit and killed by its train while he was standing in the path of the train and endeavoring to flag it down. He was not an invitee, and he was not upon a platform erected or maintained by the railroad for the use of its invitees. As section foreman of the railroad, he was necessarily familiar with the danger he assumed in standing on the track of the railroad, or so near thereto as to be in the path of the train on said track. In the Edwards case, the evidence showed that the train was closer to the crossing than the deceased, that the pilot of the engine was entirely across the highway at the time the deceased drove his car into the side of the locomotive, and that there was absolutely nothing that the Defendant railroad could have done to prevent the collision except what was done, namely, by giving warning by sounding the whistle and ringing the bell and applying the emergency brakes.

III.

This question is based upon the decision by the Court of Appeals of a Federal question in a way in conflict with the applicable decisions of this Court, in affirming the District Court in upholding a verdict for the Defendant rendered by a jury, where the Motion of Petitioner under Rule 60(b) and accompanying affidavit showed the jury had been tampered with and some of the jurors had been guilty of improper conduct of a fatally prejudicial nature to Petitioner, as

set forth in detail in said point, and in the Record at pages 594-602. This question speaks for itself. It is strongly supported by the decisions of this Court, and quotations therefrom, in *Hazel-Atlas Glass Co.* vs. *Hartford Empire Co.*, 322 U. S. 238, 64 S. Ct. 996, and *Universal Oil Products Co.* vs. *Root Refining Co.*, 328 U. S. 473, 66 S. Ct. 1176, cited, quoted, and relied upon under said question. It is also strongly supported by:

Smith vs. *State*, 122 Ga. 154, 50 S. E. 63;

Douglass vs. *State*, 152 Ga. 379, 110 S. E. 168;

Litz vs. *Harman*, 151 Va. 363, 144 S. E. 477;

Bailey vs. *Woodrum Truck Lines*, 36 S. W. 2nd 1090;

Woodrum Truck Lines vs. *Bailey*, 57 S. W. 2nd 92;

Schneider vs. *Moe*, 151 Or. 353, 50 P. 2nd 577; and

Mattox vs. *U. S.*, 146 U. S. 140, 13 S. Ct. 50.

As stated by the Court of Appeals of Georgia in *Temples* vs. *Central of Ga. Ry. Co.*, 15 Ga. App. 114, 82 S. E. 777, "AN IMPARTIAL JURY IS THE CORNERSTONE OF THE FAIRNESS OF TRIAL BY JURY," and "THE COURT SHOULD NOT REFUSE TO AWARD A LITIGANT THAT TO WHICH HE WAS ENTITLED, AND OF WHICH HE HAD BEEN DEPRIVED IN THE FIRST INSTANCE — A FAIR AND IMPARTIAL TRIAL."

Petitioner's counsel has not been able to find any decision of any court in this country, State or Federal, where a verdict, rendered by a jury which was tampered with or where some of the jurors were guilty of misconduct, has been upheld. Neither has he been able to find any case holding that it is not necessary to make an investigation as to alleged tampering with the jury or misconduct of some of the jurors, where a prima facie showing of such is made by the complaining and wronged party. In this case, a positive

prima facie showing to this effect was made by Petitioner under oath, with an attached affidavit of the person to whom the statements of the jurors were made, showing said tampering with the jury and misconduct by some of the jurors. It is utterly inconceivable how such a verdit rendered under such circumstances by such an illegal jury, prejudiced against Petitioner through extraneous influences, false and irrelevant information, and misconduct of jurors, can be upheld.

IV.

This question is based upon the proposition that the Court of Appeals in this case has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, and has decided an important State question in a way in conflict with applicable State law, in the particulars set forth in said question, as to call for an exercise of this Court's power of supervision. It shows the Trial Court excluded the very material evidence therein quoted pertaining to the effect of the impact of the train against Petitioner's son, the manner in which he was injured, the effect of the injuries, and the cause of his death, and reprimanded her counsel for offering it and made the improper statements therein quoted of a very prejudicial nature to Petitioner. This question also speaks strongly for itself.

In the case of *McCommons* vs. *Williams*, 131 Ga. 313, 62 S. E. 230, the Supreme Court of Georgia held that if evidence is admissible on behalf of a party for any purpose, though its effect on the opposite party's case may be serious, this will not make its admission erroneous as being irrelevant.

In the case of *Tifton T. & G. Ry. Co.* vs. *Butler, et al.*, 4 Ga. App. 191, 60 S. E. 1087, the Court of Appeals of Georgia held that testimony is admissible which tends to prove a

fact alleged in the petition, whether it tends to establish the right to recover or not; that testimony tending to dispute the facts set up by Defendant as a defense or to avoid the legal effect of them is admissible; and that evidence which tends to establish any part of the Plaintiff's case or to dispute any of the defenses thereto is admissible.

In the case of *Westberry* vs. *State,* 175 Ga. 115(2), the Supreme Court of Georgia held that testimony describing wounds inflicted upon a person killed, and showing there were blood stains on the shirt worn by said decedent were admissible.

In the case of *Lellyett* vs. *Markham,* 57 Ga. 13, the Supreme Court of Georgia held that improper remarks by the Trial Judge harmful to the losing party constitute ground for a new trial, even though the judge admonished the jury to disregard said remarks, and that the improper criticism of counsel or a witness by the judge is likewise ground for new trial. See also *Hudson* vs. *Hudson,* 90 Ga. 581(6).

The highly improper and prejudicial remarks made by the Trial Judge, as quoted under this question, in ruling out the material evidence offered and in reprimanding Petitioner's counsel for offering it, were more injurious to her in the consideration of the jury than the rejection of the evidence itself. His quoted remarks necessarily gave the jury the impression that her counsel was guilty of very wrongful acts in seeking to present this material evidence to the jury; that it was incompetent, inflammatory, and prejudicial to the Defendant; that her counsel had no right to present by evidence or argument to the jury "THE HORRIBLE EXTENT OF THE INJURIES," and that the jury had no right to consider the same. This meant in effect that the jury could not even consider the negligent manner in which the Defendant injured Petitioner's son or the fatal effect of the serious injuries it inflicted upon him. The Trial Judge had no right under the law to minimize in the consideration of this case by the jury the serious and fatal effect of the

gross negligence of the Defendant in killing Petitioner's son or any of the material or surrounding facts and circumstances pertaining to said matter.

The evidence presented under this point was not only relevant and material in support of the very basis of Petitioner's action for the negligent homicide of her son, it was also admissible under *Georgia Code Section 105-2022,* providing that:

> "In every tort there may be aggravating circumstances, either in the act or in the intention, and in that event, the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff."

See in this connection:

Western & Atlantic R. Co. vs. *Drysdale,* 51 Ga. 645;

Southern Ry. Co. vs. *Jordan,* 129 Ga. 665; and

Rutland vs. *Dean,* 60 Ga. App. 896.

The said illegal rulings and comments of the Trial Judge severely and illegally restricted Petitioner's counsel in his argument to the jury of her case. They prevented him from discussing or condemning the motives of the Defendant in denying in its pleadings that its train killed her son, and in seeking to prevent Petitioner's proving on the trial that its said denial was false. In the case of *Mitchum* vs. *State,* 11 Ga. at page 615, the Supreme Court of Georgia expressly held that counsel for a party, "in his address to the jury" has the "right to descant upon the facts proven or admitted in the pleadings; to arraign the conduct of parties; impugn . . . or condemn motives, so far as they are developed in evidence . . ."

See also in this connection the case of *Garrison* vs. *Wilcoxson,* 11 Ga. 154, relative to the valuable right of a party to have her case argued to the jury fully by her counsel.

V.

This question is based upon the decision by the Court of Appeals of an important State question in a way in conflict with applicable State law, in upholding the Trial Court in refusing to require the Defendant's fireman and witness, Garlington, on cross examination, to answer material and proper questions, in reprimanding her counsel for asking said questions, and making comments of a prejudicial nature to her, all in the presence and hearing of the jury, as set forth in detail in said question and in the Record at pages 614-17. This point speaks for itself. It is supported by *Alexander* vs. *State*, 114 Ga. 266, 40 S. E. 231; *Lellyett* vs. *Markham*, 57 Ga. 13; and *Mitchum* vs. *State of Georgia*, 11 Ga. 634-5.

VI.

This question is based upon the decision of the Court of Appeals of an important State question in a way in conflict with applicable State law, in upholding the Trial Court in allowing certain hearsay and argumentative testimony by Miss Maurita Sutton, witness for Defendant, of a very highly prejudicial nature to Petitioner. The said incompetent evidence is set forth in said question. This error is especially injurious to Petitioner because the incompetent evidence in question was adopted by the Court of Appeals in affirming the Trial Court, as quoted in said question.

This point is strongly supported by *Rushin* vs. *State*, 63 Ga. App. 646, 11 S. E. 2nd 844-5, and *Foster* vs. *Atlanta Rapid Transit Co.*, 119 Ga. 675, 46 S. E. 840.

VII, VIII, AND IX.

In the seventh question, Petitioner contends the Court of Appeals in this case has so far departed from the usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court, in the particulars set

forth in the preceding questions and in points on appeal and in her Petition for Rehearing, as to call for an exercise of this Court's power of supervision. In Question VIII, she contends that the Court of Appeals has deprived her of her right to a jury trial, properly and timely demanded by her, under Amendment VII of the U. S. Constitution, in said particulars. In the ninth question, she contends the Court of Appeals has deprived her of due process of law, and of her property to the extent of $250,000.00, in violation of Amendment V of the U. S. Constitution, in said particulars. These three points will be argued briefly together.

The preceding grounds show there were many substantial questions of fact presented by Petitioner on the trial of this case, which the Trial Court refused to allow the jury, or a fair and impartial jury, to decide (all in violation of the applicable and controlling authorities cited by Petitioner), and a legal decision of said questions of fact by a fair and impartial jury would have required a verdict and judgment for Petitioner.

Under the applicable and controlling law and the positive, overwhelming, and uncontradicted evidence in this case, the jury would have been forced to find a verdict in favor of Petitioner, if the jury had not been tampered with in the particulars revealed by Petitioner's Motion under Rule 60(b), and if the Trial Judge had not committed the reversible errors of a highly prejudicial nature to her, as set forth in the preceding questions.

In the last paragraph of its decision, the Court of Appeals states, "All issues were properly submitted to the jury . . ." As pointed out in the Petition for Rehearing, the Court very apparently overlooked the serious errors of a prejudicial nature to Petitioner and the many particulars in which some of the most vital issues in the case were not properly submitted to the jury, as set forth in the questions presented in this Petition for Certiorari. THESE QUESTIONS SHOW

THAT THE FORMS AND PRINCIPLES OF LAW AND THE RULES OF EVIDENCE APPLICABLE TO AND CONTROLLING PETITIONER'S CASE WERE UTTERLY ABANDONED AND DISREGARDED BY THE TRIAL JUDGE, AS AFFIRMED BY THE COURT OF APPEALS, IN THE PARTICULARS SHOWN IN SAID QUESTIONS, POINTS ON APPEAL, AND THE PETITION FOR REHEARING.

As so aptly stated by the Supreme Court of Georgia in *Mitchum* vs. *State*, 11 Ga. at page 633:

> "Trial by Jury! HOW IMPERFECT A PRIVILEGE WOULD THAT BE, IF THE FORMS OF LAW WERE ABANDONED—IF THE RULES OF EVIDENCE WERE DISREGARDED! AN ESSENTIAL ELEMENT IN THE TRIAL BY JURY IS THAT THEIR VERDICT SHALL BE RENDERED ACCORDING TO THE FACTS OF THE CASE, LEGALLY PRODUCED TO THEM. They are sworn to give their verdicts ACCORDING TO EVIDENCE, and if they find without EVIDENCE, a new trial will be granted."

> "THEY CAN NOT EVEN RENDER A VERDICT UPON KNOWLEDGE WITHIN THEIR OWN BREASTS; . . . THE LAW, WITH GREAT CAREFULNESS, PRESCRIBES RULES BY WHICH FACTS ARE TO BE SUBMITTED TO THE JURY. TESTIMONY MUST BE RELEVANT—the best evidence the nature of the case admits must be produced; HEARSAY is excluded . . ."

It was certainly not "ACCORDING TO THE FACTS OF THE CASE" to allow a verdict to stand where the jurors rendering it were contacted by some unknown person or persons and given false and irrelevant information of a prejudicial nature to Petitioner and some of the jurors were guilty of misconduct. It was not "ACCORDING TO THE FACTS OF THE CASE" to uphold a verdict where at least one of the jurors rendering it visited the scene under investigation where Petitioner's son was killed by Defend-

ant, FOR THE PURPOSE OF MAKING A PERSONAL INSPECTION OF SAID SCENE AND TO MAKE CERTAIN TESTS FOR USE AND CONSIDERATION ON THE TRIAL OF THE CASE IN ARRIVING AT A VERDICT, all without authority of the court and against its general instructions.

The verdict was most certainly not "ACCORDING TO EVIDENCE," where the Trial Judge, as shown by the preceding questions, made erroneous rulings pertaining to the evidence and improper remarks of a highly prejudicial nature to Petitioner, in the presence and hearing of the jury.

No authorities can be cited which support the said erroneous rulings and statements of the Trial Judge of a highly prejudicial nature to Petitioner, as set forth in the preceding questions. As stated by this Court in *Galloway* vs. *U. S.*, 319 U. S. 372, 63 S. Ct. 1077, the constitutional guaranty of 'trial by jury' requires that the jury be allowed to make reasonable inferences from facts proven in evidence, having reasonable tendency to sustain them. In the case of *Wilkerson* vs. *McCarthy*, 69 S. Ct. 413, 336 U. S. 53, this Court stated Courts should not assume that in determining questions of negligence, juries will fall short of their constitutional function. In this case, the Trial Judge, in the particulars specified in the foregoing questions, and as affirmed by the Court of Appeals, violated Amendment VII of the U. S. Constitution by usurping the exclusive function of the jury in deciding himself the questions of fact involved, adversely to Petitioner, instead of submitting them to a fair and impartial jury for decision.

As shown by the case of *Allesi* vs. *New York Rapid Transit Corp.*, 297 N. Y. S. 1011, in considering the degree of care required by a railroad, consideration must be had of the following elements: (a) width and length of the station platform, (b) presence and necessity for guard rails, (c) necessity and number of guards, (d) space between platform and train, (e) whether the station platform is straight

or curved and respective distances of train to straight and curved platform, (f) warnings of dangers by signs or guards, etc.

As held by the cases of *Ryan* vs. *Manhattan R. Co.*, 23 N. E. 1131, 121 N. Y. 126; *Woolsey* vs. *Brooklyn Heights R. Co.*, 108 N. Y. S. 16, 19, 123 App. Div. 631:

> "The cars must not scrape the platform of the station and must be far enough away to allow for the oscillation and swaying of the train. ON A PERFECTLY STRAIGHT TRACK, THREE OR FOUR INCHES OF SEPARATION WOULD BE ALL THAT NECESSITY REQUIRED, and as much as should be usually maintained. BUT A PERFECTLY STRAIGHT LINE CANNOT EVERYWHERE BE CONSTRUCTED . . . The body of a car forms an unbending straight line, and wherever there is a curve becomes the chord of an arc . . ."

The Georgia Supreme Court in *Atlantic & B. Railway Co.* vs. *Owens*, 123 Ga. 393, expressly makes Georgia Code Section 105-401 applicable to railroad stations, placing the duty upon railroads to keep all portions of their stations safe for the use of their invitees.

In the case of *Coffer et al.* vs. *Bradshaw et al.*, 46 Ga. App. 143, 167 S. E. 119, the Court of Appeals of Georgia held that the duty to keep the premises safe for invitees applies to defects or conditions which are in the nature of HIDDEN DANGERS, TRAPS, AND THE LIKE and that a party responsible for a DANGEROUS PLACE OR INSTRUMENTALITY MUST GUARD, COVER, OR PROTECT IT FOR THE SAFETY OF PERSONS RIGHTFULLY AT OR NEAR IT.

THE OVERWHELMING, POSITIVE, AND UNCONTRADICTED EVIDENCE, AS WELL AS THE ADMISSIONS OF DEFENDANT IN ITS ANSWERS TO PETITIONER'S INTERROGATORIES, SHOW THAT IT WAS GUILTY OF NEGLIGENCE IN FAILURE TO

COMPLY WITH THE ABOVE STATED LAWS AND THAT ITS NEGLIGENCE IN THIS CASE WAS GROSS AND CULPABLE, AMOUNTING TO "AN ENTIRE WANT OF CARE AND INDIFFERENCE TO CONSEQUENCES." *Rutland* vs. *Dean,* 60 Ga. App. 896, 5 S. E. 2nd 601; *W. & A. R. R.* vs. *Drysdale,* 51 Ga. 645; *Cain* vs. *State,* 55 Ga. App. 896, 190 S. E. 371.

THE DEFENDANT RAILROAD'S CONDUCT IN DESIGNING, CONSTRUCTING, MAINTAINING, AND INVITING THE PUBLIC UPON SUCH A DEATH TRAP as its said platform under said circumstances AMOUNTED TO GROSS NEGLIGENCE, "evincing an entire want of care and indifference to consequences." IN FACT, IT IS A MIRACLE THAT MANY MORE PERSONS WERE NOT KILLED UNDER THE CIRCUMSTANCES STATED BY ITS SAME TRAIN AND AT THE SAME TIME AND PLACE IT KILLED PETITIONER'S SON.

In the case of *Malinski et al.* vs. *People of State of N. Y.,* 324 U. S. 401, 65 S. Ct. 781, this Court held:

> "Judicial review of the guaranty of due process imposes on the Federal Supreme Court an exercise of judgment upon the whole course of proceedings to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . ."

The foregoing questions and controlling authorities show that Petitioner has been deprived of her most priceless possession on this earth, the life of her eldest son, through the gross negligence of the Defendant; and that in the trial of her case based thereon, she has been deprived of the full value of his life without any compensation whatever, without a trial according to the law of the land and applicable rules of evidence, without a determination of the questions of fact in her case by a fair and impartial jury, without regard to the overwhelming and uncontradicted evidence on many of the vital points in the case demanding a verdict in

her favor, without regard to the principles of justice, and without due process of law guaranteed to her by the Fifth Amendment of the Federal Constitution.

WHEREFORE, Your Petitioner respectfully prays that a writ of certiorari be issued by this Honorable Court, directed to the U. S. Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain therein to be named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, Mrs. Aaron (Celia) Funk, Appellant, versus Seaboard Air Line Railroad Company, Appellee, No. 14,769, and that the said decision and judgment of the U. S. Court of Appeals for the Fifth Circuit in this case be reversed by this Honorable Court, and that your Petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and proper; and your Petitioner will ever pray.

G. Seals Aiken
Attorney for Petitioner in Certiorari

Ben F. Sweet
of Counsel

"APPENDIX A"

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14769

MRS. AARON (CELIA) FUNK,
Appellant,

versus

SEABOARD AIR LINE RAILROAD COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

(April 30, 1954)

Before HUTCHESON, Chief Judge, and HOLMES and BORAH, Circuit Judges.

HOLMES, Circuit Judge: The appellant brought this suit for damages, against the appellee, for the wrongful death of her son, Vernon Funk, who was killed when struck by a train operated by appellee as it came to a stop at Emory University Station, Georgia, on June 2, 1950. The jury found for the defendant, and from the judgment entered thereon the plaintiff appealed. The facts most favorable to the defendant will be stated, since the verdict of the jury impliedly adopted such facts. They are as follows:

The decedent was at the appellee's railroad station for the purpose of bidding goodbye to some friends, and was walking toward the approaching train with a suit case that belonged to one of the girls who was to board the train. Just before the accident occurred, some of decedent's fraternity brothers warned him to "move back," to which he replied: "Oh, nothing at all will happen to me." He continued to walk along side of the track on which the train was ap-

proaching, swinging the little suit case, and as he tried to go between the track and the line of people that were on the walkway, the hand bag was hit by the lower right front side of the approaching diesel engine, about five or six feet in front of the ladder that was attached to said diesel, which swung him around and his head hit a bolt that fastened the ladder to the side of the diesel. The force of the blow was so great that Vernon died about four hours later.

The complaint alleged that the walkway of the railroad company was negligently constructed in that it was too narrow; that the surface was rough, and dropped sharply from the center toward the spur track; that the train was approaching the station at an illegal speed of thirty-five to forty miles an hour, swaying from side to side, and creating a vacuum or suction which drew the deceased against the train, resulting in the accident that caused his death; that the appellee knew or should have known that appellant's son or someone on the walkway would probably be drawn by suction against the train and injured; that the walkway was not properly protected against injury to its occupants; and that guard rails should have been provided to prevent them from getting too close to the track. The appellee denied any negligence on its part, and claimed that the decedent's own negligence was the sole proximate cause of the accident.

Appellant insists that a verdict in her favor should have been directed by the court; but she made no motion for such a verdict at the trial, and the point cannot now be raised, as the sufficiency of the evidence is not reviewable on appeal unless a motion for a directed verdict was made at the trial court. Baten v. Kirby Lumber Corp., 103 F. (2), 272; Employer's Liability Assurance Corp. v. Lejeune, 189 F. (2), 521; Tharp v. Mundy, 195 F. (2), 987; Atlantic Coast Line Railroad v. Mims, 199 F. (2), 582. Appellant assigns error by the Court in its charge to the jury that the railroad had the right to assume that the decedent was a rational human being, and would exercise reasonable care for his own protection while standing or walking on the platform. We find nothing erroneous in this instruction, as it is well settled that, in the absence of anything to the contrary, every person is presumed to possess ordinary intelligence, judgment, and discretion. Foreman v. Texas & N. O. R. R. Co., 205 F. (2) 79; Edwards v. Atlanta, Birmingham, and Coast R. Co., 63 Ga. App. 212.

The appellant also claims that the court's charge to the jury on the issue of suction was equivalent to charging that there could be no recovery based on suction. The charge, in substance, was that if under the operation of natural laws the appellee should have anticipated that the appellant's son would probably be sucked into the train because of an existing condition, not due to any negligence on the part of appellee, then the decedent would likewise be bound to anticipate the same result; but, that, if the happening was unusual and extraordinary, and not brought about by any negligence of the railroad, and the appellant's son could not have anticipated such result, then neither could the railroad be expected to anticipate it. We think these instructions to the jury were not subject to the objections urged against them. Southern Railroad vs. Young, 20 Ga. App. 362, 93 S. E. 51; Moore vs. Seaboard Air Line Railroad, 30 Ga. App. 466, 118 S. E. 471.

The issues as to whether a train creates suction and whether the defendant was negligent in that regard were before the jury on expert testimony introduced by both parties, and the jury, on precisely correct and adequate instructions, resolved those questions in the negative. Also before the jury were the issues as to whether the agents of the railroad exercised ordinary diligence in the operation of the train along the walkway, where the deceased was walking, and whether the railroad had exercised ordinary care and diligence in the construction and maintenance of said walkway, both of which issues were resolved in favor of the railroad company.

Other matters are urged by appellant, but we find no reversible error in the other assignments. The evidence was in sharp conflict, and the case was peculiarly one for the jury. All issues were properly submitted to the jury, and we have found or been shown no valid reason to disturb the verdict, which we think was based upon substantial evidence. The judgment appealed from is affirmed.

AFFIRMED.

A True copy:
Teste:

Clerk of the United States Court
of Appeals for the Fifth Circuit.

JUDGMENT.

Extract from the Minutes of April 30, 1954.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14769

Mrs. Aaron (Celia) Funk,

versus

Seaboard Air Line Railroad Company.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Mrs. Aaron (Celia) Funk, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

APPENDIX B

ORDER DENYING REHEARING.

Extract from the Minutes of June 10, 1954.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14769

MRS. AARON (CELIA) FUNK,

versus

SEABOARD AIR LINE RAILROAD COMPANY.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

APPENDIX C

ACKNOWLEDGMENT OF SERVICE

Service is hereby acknowledged and copy received of the foregoing Petition for Certiorari.

This the day of , 1954.

Counsel for Defendant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 258

MRS. AARON (CELIA) FUNK,
Petitioner

versus

SEABOARD AIR LINE RAILROAD COMPANY,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner is seeking to have this Court review the evidence in her action for damages against respondent for the death of her eighteen year old son who was killed when he came in contact with one of respondent's passenger trains at its station at Emory University, Georgia, on June 2, 1950.

The case was tried to a jury in the United States District Court for the Northern District of Georgia. A

verdict was rendered for respondent. The trial court approved the jury's verdict and entered judgment for respondent. The verdict and judgment have been approved by the United States Court of Appeals, Fifth Circuit. 212 F. 2d 434.

The issues involved in petitioner's action were whether the death of her son was caused by any negligence on the part of respondent or its agents as to the construction and condition of the walkway for passengers at its station, or in the operation of its train on the occasion involved.

Petitioner alleged in her complaint that the walkway at respondent's railroad station was negligently constructed in that it was too narrow; that the surface was rough, and dropped sharply from the center toward a spur track; that respondent's train was approaching the station at an illegal speed of 35 to 40 miles per hour, swaying from side to side, and creating a vacuum or suction which drew petitioner's son against the train resulting in the accident that caused his death; that respondent knew or should have known that her son or some other person on the walkway would in all probability be drawn by suction into and against the train and injured; that the walkway was not properly protected to prevent injury to its occupants and that guard rails should have been provided to prevent occupants of the walkway getting too close to the tracks. In its answer respondent denied any negligence on its part and claimed that the decedent's own negligence was the sole and proximate cause of the accident.

The trial consumed five days and the case record is voluminous. By its verdict the jury found from all the evidence that respondent was not liable for injuries to

and death of petitioner's son. At the trial there was no dispute as to the fact that on the occasion involved petitioner's son was on the walkway at respondent's station awaiting the arrival of respondent's passenger train, the Silver Comet, for the purpose of seeing some of his college fraternity brothers off on the train. Neither was there any dispute as to the fact that the decedent's death was caused by his coming in contact with the first diesel unit of respondent's train as it came in for a stop at said station.

There was a sharp conflict in the evidence introduced by the parties. Petitioner's evidence tended to support her claim that a train moving at the rate of approximately 35 miles per hour creates a suction or vacuum, which combined with optical illusions and vibration could have sucked or drawn her son into and against respondent's train. Respondent's expert witnesses testified to the contrary and said that trains moving at even high rates of speed do not create a vacuum or suction. Petitioner's evidence although conflicting in part generally tended to support her claim that the walkway involved was improperly constructed and negligently maintained. Respondent's evidence was to the contrary and supported its contention that the walkway was constructed according to standard engineering principles and on the occasion involved was properly maintained.

ARGUMENT

I.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE FIFTH CIRCUIT HEREIN AND THAT OF THE EIGHTH CIRCUIT IN THE CASE OF THOMPSON V. ANDERSON AND NO CONFLICT WITH APPLICABLE STATE LAW.

Petitioner seeks to show a conflict between the decision of the Fifth Circuit herein and the decision by the Eighth Circuit in the case of *Thompson v. Anderson,* 138 F. 2d 272. The Court in the Thompson case held in substance that the alleged negligence of the railroad and contributory negligence of the deceased were questions for the jury. As pointed out by the decision by the Fifth Circuit the trial court of the case herein submitted to the jury "on precisely correct and adequate instructions" the issues as to whether a train creates suction and whether the respondent was negligent in that regard and the jury resolved those questions in the negative. Petitioner argues that the trial court's charge to the jury as to her theory that her son was sucked into and against respondent's train was erroneous and thereby had the effect of not having submitted that issue to the jury. The Court of Appeals for the Fifth Circuit found the trial court's charge to the jury to have been "precisely correct and adequate." The legal basis for the fundamental correctness of the trial court's charge to the jury on the so called suction theory under the Georgia law is stated in the case of *Southern Railway Company v. Young,* 20 Ga. App. 362; 93 S.E. 51 and *Moore v. Seaboard Air Line Railroad Company,* 30 Ga. App. 466; 118 S.E. 471. Petitioner's argument under this point has the effect of

asking this Court to review the facts and substitute its findings as to the facts in place of the finding made by the jury which has been approved by the trial court and on review by the Fifth Circuit Court of Appeals. This Court has repeatedly held that it will not disturb the concurring conclusions of two lower courts on questions of actionable negligence where there is no clear or certain error. *Seaboard Air Line Railroad Company v. Renn,* 241 U.S. 290; 36 S.Ct. 567.

II.

TRIAL COURT'S CHARGE TO JURY THAT EMPLOYEES OF RESPONDENT'S TRAIN IN CHARGE OF OPERATION OF THE TRAIN HAD A RIGHT TO ASSUME THAT DECEDENT WAS A RATIONAL HUMAN BEING AND WOULD EXERCISE REASONABLE CARE AND DILIGENCE FOR HIS OWN PROTECTION AND THAT UNDER THE LAW OF THE STATE OF GEORGIA THERE WAS NO LEGAL DUTY ON THE PART OF RESPONDENT'S EMPLOYEES AND SERVANTS IN CHARGE OF THE OPERATION OF ITS TRAIN TO ANTICIPATE THAT THE DECEDENT WOULD, IF HE WAS IN AN APPARENT PLACE OF SAFETY ON THE WALKWAY BESIDE THE TRACK, MOVE IN A MOMENT OR SO FROM THAT APPARENT PLACE OF SAFETY TO AN UNSAFE PLACE ON THE WALKWAY NEARER THE TRAIN WAS NOT IN CONFLICT WITH THE APPLICABLE LAW OF GEORGIA AND WAS NOT ERRONEOUS.

The Court's charge complained of by petitioner under this point is not in conflict with the applicable law of the

State of Georgia as claimed by petitioner. The Court of Appeals for the Fifth Circuit reviewed that charge and states that it found nothing erroneous in it stating:

> "It is well settled that, in the absence of anything to the contrary, every person is presumed to possess ordinary intelligence, judgment and discretion. Foreman v. Texas & N.O.R.R.Co., 205 F. 2d 79; Edwards v. Atlanta, Birmingham & Coast R. Co., 63 Ga. App. 212."

In the Edwards case the Georgia Court of Appeals held (pgs. 215-216):

> "In the absence of anything to the contrary, every adult is presumed to possess ordinary intelligence, judgment and discretion. (Citing case). The Engineer had a right to assume that the deceased possessed such faculties, or, in other words, that he was a rational human being. There being a duty on the deceased to exercise ordinary care in approaching and using the public crossing, the Engineer likewise had the right to assume that the deceased would exercise ordinary care for his own safety and protection."

Again under this point petitioner seeks to have this Court review the evidence with a view of substituting its conclusion as to the weight and sufficiency of the evidence in lieu of the finding of the jury and the approval thereof by the two lower courts. This Court has held that a verdict of a jury in an action for personal injuries, approved by the trial court and by the Circuit Court of Appeals, settles the disputed questions of fact, *El Paso & S.W.R. Co. v. Vizard,* 211 U.S. 608; 29 S.Ct. 210.

III.

TRIAL COURT'S DENIAL OF PETITIONER'S MOTION UNDER RULE 60(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE WILL NOT BE DISTURBED EXCEPT FOR ABUSE OF DISCRETION. SAID MOTION WAS BASED UPON INCOMPETENT EVIDENCE. NO ABUSE OF DISCRETION SHOWN.

Petitioner's motion in the trial court under Rule 60(b) Federal Rules of Civil Procedure sought to obtain a new trial by impeaching the verdict of the jury through the means of a hear-say affidavit by a private detective employed in the interest of petitioner to make an investigation among the jurors several weeks after the jury's verdict was entered and after the trial court had denied petitioner's motion for a new trial. The affidavit used by petitioner in her motion to the trial court claimed that one of the jurors told the private detective that he visited the scene of the accident during the trial so as to make a personal observation of the station area and that three of the jurors told the private detective that they were "given to understand" that one or more offers of settlement had been made to petitioner which she declined. The law is well settled in the federal courts that whether a new trial will be granted because of an unauthorized view of the premises involved is a matter resting in the sound discretion of the trial court. 39 Am. Jur. Sec. 78, page 93. The rule is further well settled that the testimony or affidavits of jurors seeking to impeach their own verdict should not be considered on a motion to set aside the verdict on grounds of irregularity or misconduct on the part of the jury or some one or more of the panel. This Court held in *McDonald v. Pless*, 238 U.S. 264, 267; 59 L.Ed. 1300:

> "Let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation to the destruction of all frankness and freedom of discussion and conference."

Petitioner's motion to the trial court under Rule 60 (b) was based upon hear-say and other incompetent evidence. There was not a scintilla of evidence that the jury was tampered with or that any fraud occurred. There was no abuse of discretion by the trial court in denying said motion.

IV.

THE TRIAL COURT'S EXCLUSION OF IRRELEVANT EVIDENCE WILL NOT BE REVERSED BY THIS COURT. ALLEGED PREJUDICIAL REMARKS BY TRIAL COURT NOT OBJECTED TO ON TRIAL WILL NOT BE CONSIDERED BY THIS COURT.

Petitioner's statement of this point and the alleged basis therefor, at pages 8, 9 and 10 of her petition, claims at page 10 that the trial court's exclusion of certain evidence offered by her and alleged reprimands of her counsel by the court and certain remarks by the court deprived her of a fair and impartial trial by the jury and

of a jury trial guaranteed to her by Amendment VII of the United States Constitution and deprived her of her property to the extent of the amount sued for, without due process of law in violation of Amendment V of the United States Constitution.

In petitioner's argument under this point, at pages 28-31 of her petition, she claims that this question is:

> "Based upon the proposition that the Court of Appeals in this case has so far departed from the usual and accepted course of judicial proceedings, or so far sanctioned such a departure by a lower court, and has decided an important state question in a way in conflict with applicable state law, in the particulars set forth in said question, as to call for an exercise of this Court's power of supervision."

There is no proper basis for either of petitioner's theories. The evidence excluded by the trial court as referred to under this question by petitioner concerned the amount of blood flowing from the injury received by the deceased and whether he was conscious or unconscious after the accident occurred. Such evidence was clearly irrelevant to the issues involved and was properly excluded. This Court will not reverse a judgment upon the ground that evidence which was clearly immaterial was excluded in the court below. *National S.S. Co. v. Tugman,* 143 U.S. 28; 12 S.Ct. 361; 36 L.Ed. 63. No objection was made at trial to the alleged reprimand of petitioner's counsel by the court nor to any of the remarks by the court now herein complained of. This Court will not consider alleged prejudicial remarks by a court unless objected to on trial. *Drumm-Flato Commission Co. v. Edmisson,* 208 U.S. 534; 28 S.Ct. 367; 52 L. Ed. 606.

V.

ALLEGED PREJUDICIAL REMARKS BY TRIAL COURT NOT OBJECTED TO ON TRIAL WILL NOT BE CONSIDERED.

Under this point petitioner again seeks consideration by this Court of alleged prejudicial remarks by the trial court to which her counsel made no objection on the trial. This point is also controlled by this Court's decision in *Drumm-Flato Commission Co. v. Edmisson,* supra, and will not be considered by the court.

VI.

NOT ERROR FOR TRIAL COURT TO ADMIT TESTIMONY RESPONSIVE TO SUBJECT MATTER INQUIRED INTO BY PETITIONER'S COUNSEL.

The testimony of Miss Maurita Sutton, a witness for respondent referred to by petitioner under this question and the trial court's ruling thereon appears at pages 540-541 of the transcript of the record in the trial court. Reference thereto will show that the testimony now objected to was admitted by the court for the reason that petitioner's counsel had himself inquired into that same subject matter in his cross examination of the previous witness and thereby opened the subject for inquiry by respondent's counsel in the examination of subsequent witnesses. Moreover, the testimony was admitted by the court subject to certain allowances that the court would grant respondent's counsel on cross examination of the witness. Petitioner's counsel cross examined the witness Miss Sutton but did not thereafter renew his objection to the testimony after his cross examination of the wit-

ness. Petitioner thereby waived any objection to the testimony by said witness.

VII, VIII, IX.

SCANDALOUS AND DEFAMATORY CHARGES BY PETITIONER AND HER COUNSEL AGAINST THE TRIAL JUDGE AND THE COURT OF APPEALS ARE WITHOUT ANY BASIS WHATSOEVER AND SHOULD BE STRICKEN BY THE COURT IN ACCORDANCE WITH RULE 40(5).

As an omnibus reason for the allowance of the writ petitioner charges under questions 7, 8 and 9 (page 33 of the petition) that the trial judge and the Court of Appeals utterly abandoned and disregarded the forms and principles of law and the rules of evidence applicable to and controlling her case and charges, at page 34, that the trial judge affirmed by the Court of Appeals violated Amendment VII of the United States Constitution:

> "By usurping the exclusion function of the jury in deciding himself the questions of fact involved, adversely to petitioner, instead of submitting them to a fair and impartial jury for decision."

and, at pages 36 and 37 that she has been deprived of the life of her eldest son:

> "Through the gross negligence of the defendant; and that in the trial of her case based thereon, she has been deprived of the full value of his life without any compensation whatever, without a trial according to the law of the land and applicable rules of evidence, without a determination of the questions of fact in her case by a fair and impartial jury,

> without regard to the overwhelming and uncontradicted evidence on many of the vital points in the case demanding a verdict in her favor, without regard to the principles of justice, and without due process of law guaranteed to her by the Fifth Amendment of the Federal Constitution."

Those are serious charges to make against the trial judge and the Court of Appeals and the administration of justice in the Fifth Circuit and counsel for respondent is astonished that they have been made when there is utterly no basis for them as the record in this case will bear out. The charges are scandalous and defamatory and counsel for respondent will not let them go unchallenged. This Court knows from experience with them the caliber of the judges of the Fifth Circuit. This case was argued before Hutcheson, Chief Judge, Holmes and Borah, Circuit Judges. Their records for ability, fairness and integrity have long been outstanding and speak for themselves in repeated decisions from that court. Let it also be known to this Court that the trial judge of this case in the District Court, the Honorable Boyd Sloan is held in high esteem by the Bar and the Judiciary in Georgia as an able judge with many years experience on the bench, learned in the law and fair and impartial in his administration of justice.

Rule 40 (5) of this Court prohibits the inclusion of scandalous matter in briefs. Counsel for respondent urges the Court to make a determination from the record satisfactory to itself as to whether there is any basis for the serious charges as made and if the Court finds no basis for such charges that it order the scandalous and defamatory remarks stricken from petitioner's brief in accordance with Rule 40 (5) and that the Court issue

such further orders in the premises deemed necessary and appropriate to prevent a recurrence in the future of such reckless and irresponsible charges by petitioner or her counsel.

CONCLUSION

It is respectfully submitted that petitioner's writ for certiorari be denied.

ROBERT S. SAMS

ALLEN E. LOCKERMAN
Attorneys for Respondent

Of Counsel:
TROUTMAN, SAMS, SCHRODER & LOCKERMAN
1607 William-Oliver Building
Atlanta 3, Georgia

ACKNOWLEDGMENT OF SERVICE

Service is hereby acknowledged, and copy received of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari.

This.....day of August, 1954.

Counsel for Petitioner

Office - Supreme Court, U. S.
FILED
SEP 22 1954
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1954

No. 258

MRS. AARON (CELIA) FUNK,
Petitioner in Certiorari,

vs.

SEABOARD AIR LINE RAILWAY COMPANY,
Defendant in Certiorari.

REPLY BRIEF OF PETITIONER FOR CERTIORARI

G. SEALS AIKEN
1105-6 First National Bank Building
Atlanta 3, Georgia
Attorney for Petitioner in Certiorari

EN F. SWEET
114 Hurt Building
tlanta 3, Georgia
Of Counsel

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1954

No. 258

MRS. AARON (CELIA) FUNK,
Petitioner in Certiorari,

vs.

SEABOARD AIR LINE RAILWAY COMPANY,
Defendant in Certiorari.

REPLY BRIEF OF PETITIONER FOR CERTIORARI

In accordance with Rule 24(4) of this Court, Petioner submits the following brief in reply to the brief of Respondent.

STATEMENT OF CASE BY RESPONDENT

Respondent states in the first paragraph of its brief that, "Petitioner is seeking to have this Court review the evidence" in this case. This is not a correct statement of Petitioner's position. She has applied to this Court for a Writ of Certiorari to the U. S. Court of Appeals for the Fifth Circuit, so this Court can review and pass upon the errors of grave and public concern committed by that Court, as pointed out in the Ques-

tions presented for review in her Petition. As shown by said Petition for Certiorari in this Court and the Petition for Rehearing in the Court of Appeals, she was deprived of a jury trial in violation of Amendment VII of the U. S. Constitution and of due process of law in violation of Amendment V of said Constitution, in the particulars specified. Her specifications in said Petition, as supported by the record, show there were many material and substantial questions of fact presented by her pleadings and the evidence on the trial, which the Trial Judge refused to allow the jury, or a fair and impartial jury, to decide, and that a legal decision of said questions of fact by a fair and impartial jury would have required a verdict and judgment for her. The said specifications and record show that, under the positive and uncontradicted evidence in this case and the applicable and controlling law, the jury would have been forced to find a verdict in favor of Petitioner if it had not been tampered with in the particulars revealed by her Motion Under Rule 60(b), and if the Trial Judge had not committed the serious reversible errors of a prejudicial nature to her, as set forth in her Points on Appeal in the Court of Appeals and her Questions for Review in this Court.

The Respondent states that in its answer it denied any negligence on its part, "and claimed that the decedent's own negligence was the sole and proximate cause of the accident." This statement of Respondent is true, but it failed to produce any evidence of negligence on the part of decedent, and Petitioner presented positive, overwhelming, and uncontradicted evidence showing Respondent was negligent in many respects proximately causing the death of decedent. The burden, under the law, was upon the Respondent to show that "decedent's own negligence was the sole and proximate cause" of his death. 1933 *Georgia Code Section* 94-

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1108; and *Collier* vs. *Bollard*, 60 Ga. App. 105, 2 S. E. 2nd 821. The Respondent admits, however, that, "At the trial there was no dispute as to the fact that on the occasion involved Petitioner's son was on the walkway at respondent's station awaiting the arrival of respondent's passenger train, the Silver Comet, for the purpose of seeing some of his college fraternity brothers off on the train." The uncontradicted evidence showed that the decedent was upon the platform of the Respondent where he was invited by it and where he had a legal right to be, when he was negligently hit and fatally injured by Respondent's train. Under the law of Georgia, the decedent had a right to expect the said entire platform to be safe for his use as an invitee of Respondent on the occasion in question. *Georgia Code Section* 105-401; *Atlantic & B. Ry. Co.* vs. *Owens*, 123 Ga. 393, 51 S. E. 404; *Coffer et al.* vs. *Bradshaw et al.*, 46 Ga. App. 143, 167 S. E. 119.

Respondent states on page 3 of its brief that there was a sharp conflict in the evidence introduced by the parties, and the Court of Appeals also states in the last paragraph of its decision that, "The evidence was in sharp conflict . . ." These statements are incorrect and incomplete in some vital respects, in that there were many important particulars in which there was no conflict in the evidence. Some of the UNCONTRADICTED EVIDENCE demanding a verdict and judgment for Petitioner was as follows:

1. That Petitioner's son was an invitee of the Respondent railroad at the time he was hit and fatally injured by its train.

2. That he was on the platform of Respondent where he was invited by it to be at the time he was fatally injured by its train.

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3. That the entire platform was only 5½ feet in width from the ends of the cross ties of the Respondent's main track on the north to the ends of the cross ties of its side or spur track on the south.

4. That there was a drop of about two inches per foot from the center of the platform toward the side track.

5. That Petitioner's son was about the center of the width of the platform and two or three feet from the roadbed of the main track when he was hit and fatally injured by the side of Respondent's train.

6. That there was no curb or railing or line or separation between the platform and the roadbed of the main track or anything else to indicate that any portion of the platform was traversed by the overhang of the Respondent's train or was unsafe for its invitees for any other reason.

7. That Professor Harrelson measured the overhang of the train of Respondent, which hit and fatally injured Petitioner's son, and observed said train on several occasions as it came alongside said platform, and found that the overhang of the train traversed at least 26 or 27 inches of the surface of the platform.

8. That Respondent gave decedent no warning whatever of the danger to him in walking upon the portion of the platform where he was located at the time he was hit by its train, or that any part of the platform was unsafe for his use.

9. That there were 100 or more people on said narrow and unsafe platform, according to Respondent's own witness and station agent, Ray Walker, at the time its train came alongside the platform on the occasion in question, but that the Respondent, nevertheless, provided no person to regulate or control said large crowd on said narrow and dangerous platform or to warn its invitees of the dangers in using it.

10. That the Respondent's train came alongside said platform on the occasion in question at a rate of speed somewhere between 25 and 45 miles per hour.

11. That Witness Edwin Halpern, who was standing on said platform near Petitioner's son, felt a wind of hot air and cinders as the train came in, and it swirled around and came back toward the train, and he stepped back and moved his suitcase toward the spur track for that reason.

IMPORTANT QUESTIONS PRESENTED FOR REVIEW

I.

Respondent contends under this Question, on pages 4 and 5 of its brief, that there is no conflict between the decision of the Court of Appeals for the Fifth Circuit in this case and that of the Eighth Circuit in the case of *Thompson* vs. *Anderson*, 138 Fed. 2nd 272. This statement, however, is contrary to the decisions in question. The conflict between them is pointed out very graphically on pages 1, 3, and 22 through 25 of the Petition for Certiorari, and Respondent does not show any error in said presentation, or attempt to do so. In the Thompson Case, the Trial Court submitted to the

jury for its determination the question as to whether decedent could have been drawn into the passing train by suction. The Court of Appeals for the Eighth Circuit affirmed a verdict against the railroad in that case, and stated it was clear from all the evidence that a fast moving train causes a disturbance in the air as it passes, citing with approval the case of *Richardson* vs. *Detroit & M. R. Co.*, 176 Mich. 418, 142 N. W. 832-6, in which the Supreme Court of Michigan seemed to take judicial notice that a suction would be produced by the passing of a train at a speed of 30 to 40 miles an hour sufficient to draw the skirts of a woman standing near-by into the wheels of the train; and citing with approval 44 *Am. Jur., Section* 457, stating that in cases of injuries to persons lawfully on station platforms, as a result of suction or wind from a rapidly passing train, the courts generally hold that the questions of negligence and contributory negligence are for the jury, AND THAT RECOVERY FOR SUCH AN INJURY IS NOT PRECLUDED ON THE GROUND THAT IT SHOULD NOT REASONABLY BE ANTICIPATED.

IMPORTANT QUESTIONS PRESENTED

The complaint of Petitioner is that the Fifth Circuit in the case at bar departed from the principles laid down by the Eighth Circuit in the Thompson Case by approving the following conflicting charge of the Trial Court:

> That if under the operation of natural laws the Appellee should have anticipated that the Appellant's son would probably be sucked into the train because of an existing condition, not due to any negligence on the part of appellee, then the decedent would likewise be bound to anticipate the same result, but that, if the happening was unusual and extraordinary and not brought about by any negligence of the railroad, and the Appel-

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lant's son could not have anticipated the result, then neither could the railroad be expected to anticipate it."

and that such charge had the effect of withdrawing entirely from the consideration of the jury the question of suction or vacuum, as applied to her son under the facts and circumstances of this case. There was no such charge in the Thompson Case in the Eighth Circuit, and the jury found against the railroad, although the facts in that case are very similar to the case at bar. A summary of the dimensional and other facts in the Thompson Case and in the case at bar will be found at pages 22 and 23 of the Petition for Certiorari, and is omitted here for the sake of brevity.

Furthermore, Respondent's argument refers to the fact that the Fifth Circuit held that the "Trial Court of the case herein submitted to the jury 'oh precisely correct and adequate instructions' the issues as to whether a train creates suction and whether the respondent was negligent in that regard," and that, "The jury resolved those questions in the negative." The difficulty with this contention is that, although respondent concedes in its summarization of the facts that Petitioner's evidence tended to support her claim that a train moving at the rate of 35 miles per hour "CREATES" a suction vacuum which, combined with optical illusions and vibration, could have sucked or drawn her son into and against respondent's train, and generally tended, although conflicting in part, to support her claim that the walkway was improperly constructed and negligently maintained; the portion of the charge complained of nevertheless permitted, if it did not direct, the jury to disregard all of the Petitioner's contentions admittedly established by her evidence and to disregard respondent's failure to exercise that degree

of care required of it by law with respect to the construction and maintenance of platforms at congested railway stations to make them safe for the use of its passengers and invitees.

Petitioner desires to emphasize that the question is not whether Respondent negligently created a suction or vacuum, but whether it ran its train at such a rate of speed as to bring into operation the laws of physics producing a suction or vacuum to such an extent and in such a manner, with accompanying vibration, optical illusions, etc., as to draw her son into the side of the train, under the circumstances. The operation of the laws of physics creating suction, resulting from the negligent rate of speed at which Respondent was operating its train, under the circumstances stated, as shown in this case, constituted merely one of the factors proximately contributing to the fatal injury of the decedent. Petitioner also proved that Respondent was negligent in failing to provide and maintain a safe and adequate platform which was smooth and level and suitable for walking and standing upon, and which had sufficient width to accommodate, without congestion or danger, the passengers and other persons invited thereon by Respondent (which were at least 100 in number on the occasion in question); in not providing railings or curbs or anything else to indicate that any portion of the platform was dangerous or to protect its invitees against the danger in using certain portions of the platform, especially as its train passed the same and the overhang of the train traversed 26 or 27 inches of the platform; in not warning decedent against or protecting him from the fatal effects of the suction or vacuum created by the laws of physics at the rate of speed the train was being operated, and from the overhang of the train in traversing 26 or 27 inches of the surface of the platform, as aforesaid. The charge com-

plained of had the effect of withdrawing from the consideration of the jury all of said acts of negligence charged against Respondent and supported by strong evidence presented by Petitioner.

The charge complained of under this point was also in direct conflict with the Georgia Law on a very important state question, as shown by the following authorities cited on page 3 of the Petition for Certiorari:

Western & Atlantic Ry. Co. vs. *Wright*, 79 Ga. App. 733, 54 S. E. 2nd 655;

Atlantic & B. Ry. Co. vs. *Owens*, 123 Ga. 393, 51 S. E. 404;

Coffer et al. vs. *Bradshaw et al.*, 46 Ga. App. 143, 167 S. E. 119;

Collier vs. *Pollard*, 60 Ga. App. 105, 2 S. E. 2nd 821; and

Georgia Code Sections 94-1108 and 105-401.

Respondent states on page 4 of its brief that, "The legal basis for the fundamental correctness of the trial court's charge to the jury on the so called suction theory under the Georgia law is stated in the case of *Southern Railway Company* vs. *Young*, 20 Ga. App. 362; 93 S. E. 51 and *Moore* vs. *Seaboard Air Line Railroad Company*, 30 Ga. App. 466; 118 S. E. 471." As pointed out on pages 24 through 25 of the Petition for Certiorari, however, these cases are not in point with the facts in the case at bar, and have no application whatever to it. Reference to the case of *Western & Atlantic Ry. Co.* vs. *Wright*, supra, will show that the railroad in that case also unsuccessfully sought to have the Court of Appeals follow the cases of *Southern Rail-*

way Company vs. *Young*, supra, and *Moore* vs. *Seaboard Air Line Railroad Company*, supra, relied upon by Respondent in the case at bar. The Court of Appeals of Georgia in that case differentiated it from the said cases relied upon here by Respondent. It stated it could not "say as a matter of law that no suction was probable or possible under the situation alleged in the petition, OR THAT THE DECEASED SHOULD NECESSARILY HAVE KNOWN AS MUCH ABOUT SUCTION UNDER SUCH CIRCUMSTANCES AS THE EMPLOYEES IN CHARGE OF THE OPERATION OF THE TRAIN," and "that the jury, under sufficient evidence, would be authorized to find that such a force could operate to draw a man into a train where he is standing between a moving train and cars on an adjacent track," and that, "in such a situation it would be a jury question whether the railroad should anticipate the danger of one it should anticipate was so situated and exercise ordinary care to avoid injuring him."

Respondent states under this point that, "The Court of Appeals for the Fifth Circuit found the Trial Court's charge to the jury to have been 'precisely correct and adequate'." Reference to this point, however, as presented on pages 2 through 4 and 21 through 25 of the Petition for Certiorari and the record pertaining thereto will show that this finding of the Court of Appeals is incorrect.

The charge complained of under this question withdrew entirely from the consideration of the jury the negligence of the Respondent in constructing and maintaining such a narrow, rough, and uneven platform, without any curb or railing or marks or space to separate it from the roadbed of the main track, or to show that 26 or 27 inches of the surface of said platform was

traversed by the overhang of its train or that any portion of said platform was unsafe for its invitees. It also withdrew from the consideration of the jury the negligence of the Respondent in inviting Petitioner's son upon said dangerous platform without any warning to him of the danger of using certain portions thereof, and without any protection whatever to him from said dangerous portions. The said charge entirely relieved Respondent from liability to Petitioner for all of its said negligence proximately causing the death of her son, in violation of the applicable law of Georgia, and the Federal law in such cases as laid down by the Court of Appeals for the Eighth Circuit in *Thompson* vs. *Anderson*, supra. It completely relieved the Respondent from its liability to Petitioner to maintain all of its said platform in a safe condition for the use of her son as its invitee on the occasion in question, in violation of the Georgia law as set forth in *Georgia Code Section* 105-401 and *Atlantic & B. Ry. Co.* vs. *Owens*, 123 Ga. 393. It entirely relieved Respondent of its liability to Petitioner under the law of Georgia, as set forth in the case of *Coffer et al.* vs. *Bradshaw et al.*, 46 Ga. App. 143, to keep its said platform safe for Petitioner's son, as its invitee, as to the hidden dangers, traps, and the like, and the overhang of its train, as briefly described.

The said charge entirely relieved Respondent of its liability to Petitioner for its gross negligence in not guarding or covering said dangerous place on its platform, and in not guarding or protecting the decedent from the overhang of its train or from the suction caused by its train as it came alongside said platform. The said charge limited the jury to determining whether the alleged suction was caused by the negligence of the Respondent, whereas the evidence, pleadings, and contentions of Petitioner presented for the consideration and determination of the jury the questions of neg-

ligence of Respondent, stated briefly above, which subjected her son to the fatal effects of said suction, and for which negligence Respondent was liable to her, whether or not the suction itself was caused by its negligence.

Petitioner contended and still contends the Respondent was grossly negligent and liable to her under the law for killing her son, by reason of its invitation to him to come upon its platform under the conditions shown, when it knew the overhang of its train traversed at least 26 or 27 inches of the surface of the platform and that a suction toward the train of persons on the platform was caused as the train passed at the rate of speed it was making, as shown by the evidence in this case, all without any warning whatsoever to the decedent or any knowledge on his part of said dangerous conditions. Even if the suction was caused without any negligence whatever on the part of Respondent, it was still liable to Petitioner for its gross negligence in inviting her son into such a dangerous trap, in which he would necessarily be subjected to the fatal effects of said suction, without any warning to him or knowledge thereof on his part.

The said charge withdrew entirely from the consideration of the jury the duty of Respondent to anticipate that, under the operation of natural laws, Petitioner's son would probably be drawn into the train from said platform at the rate of speed the train was making and considering the fact that the overhang of the train traversed at least 26 or 27 inches of the surface of the platform. It also entirely withdrew from the consideration of the jury its right to hold Respondent liable to Petitioner for the death of her son if he was drawn into its train from its said dangerous platform by suction in an unusual and extraordinary manner. It entirely

withdrew from the jury its right to hold Respondent liable for the death of Petitioner's son if he was drawn into its train by suction under the operation of natural laws or in an ordinary and natural manner, on the occasion in question. The said charge entirely relieved Respondent of its duty, under the law, to anticipate that Petitioner's son would be drawn by suction into its train on the occasion in question and under the circumstances stated, whether in an ordinary or unusual manner, and illegally placed upon the decedent the entire liability for said suction and its effect upon him.

The charge of the Trial Judge, as approved by the Court of Appeals for the Fifth Circuit in this case, was in direct conflict with the law on this point relative to suction laid down by the Court of Appeals for the Eighth Circuit in the case of *Thompson* vs. *Anderson*, supra.

The said charge illegally restricted the jury to determining whether the suction itself was caused by ordinary negligence of Respondent, instead of allowing the jury to perform its full duty by determining whether Petitioner's son was killed through its negligence in inviting him into a place where he would be drawn into the train by suction, whether caused by the negligence of Respondent or by natural laws. Petitioner contended and still contends that the suction in this case resulted from the operation of the natural laws of physics by reason of the negligent and reckless rate of speed at which the train of Respondent was being operated at the time it struck the decedent, under all the facts and circumstances.

The charge complained of was not adjusted to the evidence and pleadings in this case, but was highly argumentative in favor of Respondent and against Petitioner.

II.

This question is based upon the affirmance by the Court of Appeals of the charge of the Trial Court to the jury that the employees of Respondent in charge of the operation of its train had a right to assume that decedent was a rational human being and would exercise reasonable care and diligence for his own protection, and that under the law of Georgia, there was no legal duty on the part of Respondent's employees and servants in charge of the operation of its train to anticipate that decedent would, if has was in an apparent place of safety on the walkway beside the track, move in a moment or so from that apparent place of safety to an unsafe place on the walkway nearer the train. Respondent contends on pages 5 and 6 of its brief that this charge was not in conflict with the applicable law of Georgia and was not erroneous for any reason. Respondent states the Court of Appeals for the Fifth Circuit reviewed this charge and found nothing erroneous in it, and quotes the following from that Court's decision:

> "It is well settled that, in the absence of anything to the contrary, every person is presumed to possess ordinary intelligence, judgment and discretion. Foreman v. Texas & N. O. R. R. Co., 205 F. 2d 79; Edwards v. Atlanta, Birmingham & Coast R. Co., 63 Ga. App. 212."

Respondent then quotes from the case of *Edwards* vs. *Atlanta, Birmingham & Coast R. Co.*, 63 Ga. App. 212, to the effect that every adult is presumed to possess ordinary intelligence, judgment and discretion in the absence of anything to the contrary; that the engineer of the train had a right to assume that the deceased possessed such faculties or was a rational human being;

that there was a duty on the deceased to exercise ordinary care "in approaching and using the public crossing"; and that, "the engineer likewise had the right to assume that the deceased would exercise ordinary care for his own safety and protection." As pointed out under this point on pages 4 and 5 and 26 and 27 of the Petition for Certiorari, the above stated cases cited by the Court of Appeals are not in point on their facts with the case at bar, and have no application whatever to it. In the Foreman Case, the decedent was a section foreman of the railroad and was hit and killed by its train WHILE HE WAS STANDING IN THE PATH OF THE TRAIN AND ENDEAVORING TO FLAG IT DOWN. In the Edwards Case, the decedent was "approaching and using the public crossing," and DROVE HIS CAR INTO THE SIDE OF THE LOCOMOTIVE WHEN THE ENGINE OF THE TRAIN WAS ENTIRELY ACROSS THE HIGHWAY AT SAID CROSSING, and there was absolutely nothing the defendant railroad could have done to prevent the collision except what it did, namely, give warning by sounding the whistle, ringing the bell, and applying the emergency brakes.

THE CHARGE EXCEPTED TO ALLOWED THE JURY TO SPECULATE WHETHER PETITIONER'S SON WAS OR WAS NOT A RATIONAL HUMAN BEING, AS IF THE RAILROAD COULD BE RELIEVED OF THE DUTY OF EXERCISING ORDINARY CARE TO MAINTAIN SAFE AND EFFICIENT RAILWAY STATIONS AND PLATFORMS IF CERTAIN OF ITS PASSENGERS OR INVITEES WERE LESS THAN RATIONAL IN MIND.

The said charge was not adjusted or applicable to the facts in this case, was argumentative in favor of Re-

spondent, and was highly prejudicial to Petitioner. There was nothing whatever in the evidence to authorize the jury to find that Petitioner's son was not a rational human being in accepting the invitation of Respondent to come upon and use its platform, as he was doing on this occasion, or that he was irrational in walking from one place to another on the platform, upon which he was invited. This charge necessarily gave the jury the impression that Petitioner's son was irrational and committed suicide by deliberately walking into the side of the train, when there was no evidence whatever to authorize such an inference or to support such a charge. The charge was exactly the reverse of what it should have been under the law of Georgia, in that Petitioner's son had a right to assume that the employees and servants of the Respondent were rational human beings and would exercise reasonable care and diligence for his care and protection and would not invite him upon a platform which was unsafe or where he would be subjected to danger by the use of any part of it, without any kind of warning or signs or rails or guards to indicate that any part of the platform was dangerous or to protect him from said dangerous portion of the platform and the overhang of its train, under the circumstances stated. 1933 *Georgia Code Section* 94-1108; and *Collier* vs. *Pollard*, 60 Ga. App. 105, 2 S. E. 2nd 821.

This Court and the Appellate Courts of Georgia have repeatedly held that charges to juries must be confined to the issues and must be predicated on facts in issue. *Wilmington Star Mining Co.* vs. *Fulton*, 204 U. S. 60, 27 S. Ct. 412; *Chicago R. I. & P. R. Co.* vs. *Houston*, 95 U. S. 697; *Howard* vs. *Milwaukee, St. P. R. Co.*, 101 U. S. 837; *Gorman* vs. *Campbell*, 14 Ga. 137; *Gaskins* vs. *Gaskins*, 145 Ga. 806, 89 S. E. 1080; *Fuller* vs. *Stone*, 207 Ga. 355, 61 S. E. 2nd 467.

The charge excepted to under this ground was given in response to a written request by Respondent and should have been refused because it was not adjusted to or supported by the evidence in this case, was entirely inapplicable, and for the additional reason that it violated the rule laid down by this Court in *Grand Trunk Ry. Co. of Canada* vs. *Ives*, 144 U. S. 408, 12 S. Ct. 679, quoting a somewhat similar erroneous request to charge, which was refused in that case, and holding as follows:

> "The reason given by the court for refusing this request was that 'it is too much upon the weight of the evidence, and confines the jury to the particular circumstance narrated, without notice of others that they may think important.' This reason is a sound one."

This Court in that case further held:

> "In determining whether the deceased was guilty of contributory negligence the jury were bound to consider all the facts and circumstances bearing upon that question, AND NOT SELECT ONE PARTICULAR PROMINENT FACT OR CIRCUMSTANCE AS CONTROLLING THE CASE TO THE EXCLUSION OF ALL THE OTHERS . . ."

To use the language of this Court in *Brown* vs. *Western Railway of Alabama*, 338 U. S. 294, 70 S. Ct. 105, "Here the" U. S. Court of Appeals for the Fifth Circuit "has decided as a matter of law that no inference of railroad negligence could be drawn from the facts alleged" and proven "in this case," but, "Rather the court itself has drawn from the pleadings" and the evidence "the reverse inference that the sole proximate

cause of petitioner's" son's "injury was his own negligence," and that, "Throughout its opinion the appellate court clearly reveals a preoccupation with what it deemed to be petitioner's" son's "failure to take proper precautions." This Court reversed that case with the statement "that petitioner should be allowed to try his case." The same principles should be applied to this case.

III.

Respondent contends on pages 7 and 8 of its brief that Petitioner is seeking under this ground to obtain a new trial "by impeaching the verdict of the jury through the means of a hearsay affidavit by a private detective employed in the interest of petitioner to make an investigation among the jurors several weeks after the jury's verdict was entered and after the trial court had denied petitioner's motion for a new trial." This statement is not correct. Petitioner is not seeking to impeach the verdict by any juror or jurors or by the affidavit of another person as to what some of the jurors told him. It is not an effort to invade the private deliberations of the jury, but a proper and legal exposure of the misconduct of some of the jurors and of the tampering with the jury by some unknown person or persons in such a manner as to deprive Petitioner of her property, without due process of law in violation of Amendment V of the U. S. Constitution, without a jury trial guaranteed to her by Amendment VII of said Constitution, and in the language of this Court in *Hazel-Atlas Glass Co.* vs. *Hartford Empire Co.*, 322 U. S. 238, 64 S. Ct. 996, to expose what "INVOLVES FAR MORE THAN AN INJURY TO A SINGLE LITIGANT," BUT WHAT AMOUNTS TO "A WRONG AGAINST THE INSTITUTIONS SET UP TO PROTECT AND SAFEGUARD THE PUBLIC, INSTITUTIONS IN WHICH FRAUD CANNOT COMPLACENTLY BE

TOLERATED CONSISTENTLY WITH THE GOOD ORDER OF SOCIETY."

It would indeed be a sad day for our country if our courts could do nothing to protect litigants and the public generally from misconduct on the part of jurors trying a case, and from tampering with jurors while engaged in a trial, upon the theory that the setting aside of a verdict and judgment, secured under such circumstances, would amount to an impeachment of the verdict by a juror or jurors and an invasion of the private deliberations and prerogatives of the jury. It would likewise be shocking to the moral sense to hold that such a fraud upon the court and upon the administration of justice according to law cannot be exposed except by affidavits or confessions of jurors themselves. As stated by the Master in the cases of *Universal Oil Products Co.* vs. *Root Refining Co.*, 328 U. S. 473, 66 S. Ct. 1176, with the apparent approval of this Court, such an "investigation—for that is all that it is—should (not) be conducted strictly according to the rules of evidence in litigation." As stated by this Court in that case, "The power to unearth such a fraud is the power to unearth it effectively," and, "Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation," and, "No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties."

The Petition for Certiorari and the record show Petitioner accurately followed Rule 60(b) of the Federal Rules of Civil Procedure and the decision of this Court in *Universal Oil Products Co.* vs. *Root Refining Co.*, supra, in bringing to the attention of the Trial Court

the fraud practiced upon it, in submitting prima facie proof thereof, in urging a full and fair investigation of said alleged fraud, and in the offer by her counsel of their services, as officers and friends of the court, in every legal and proper manner, in the conduct of said investigation, and in urging the Trial Court to allow her counsel to argue said Motion under Rule 60(b) orally.

Petitioner and her counsel are unable to understand, and cannot explain, why the Trial Court denied every one of her prayers in said Motion, ignored said offer of her counsel, and failed and refused to make any investigation whatever of the serious fraud upon the court established by prima facie proof in the form of an affidavit accompanying the Motion. They are unable to understand why Respondent and its counsel objected so strenuously to any investigation whatever of said alleged fraud established by prima facie proof under oath.

Section 1503 *of* 18 *U. S. C. A.* expressly provides that:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede . . . any grand or petit juror, or officer in or of any court of the United States . . . in the discharge of his duty . . . or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

In the case of *Broadbent* vs. *U. S.*, 149 Fed. 2nd 580, the U. S. Court of Appeals held that any endeavor to

impede and obstruct justice falls within the connotation of the word, "corruptly," as used in the above quoted Section.

In the case of *Sinclair et al.* vs. *U. S.*, 279 U. S. 749, 49 S. Ct. 471, this Court quoted the language of Mr. Chief Justice White from the case of *Toledo Newspaper Co.* vs. *U. S.*, 247 U. S. 402, 38 S. Ct. 560, recognizing and sanctioning "the existence of the right of self-preservation" of courts, "that is, the power to restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power given by summarily treating such acts as a contempt and punishing accordingly." This Court further held in the Sinclair Case as follows:

> "... The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law."

In the Sinclair Case, this Court held that the mere shadowing of the jury, without actual contact with any member thereof, "tended to obstruct the honest and fair administration of justice," and therefore constituted contempt of court.

As stated by the Supreme Court of Georgia in *Mitchum* vs. *State*, 11 Ga. at page 631:

> "... All courts have power to protect themselves from contempts.... This is a matter of course in the Courts of civilized communities. Nor is it matter of form merely; for no Court can command from a civilized public that respect which is necessary to an efficient administration of the law,

> without maintaining in the business of the Court that courtesy, and dignity, and purity, which characterize the intercourse of gentlemen in private life."

The misconduct of some of the jurors and the tampering with the jury in this case, as revealed by prima facie proof under this Point III and supported by the record, show a contempt of and fraud upon the Trial Court, in obstructing justice, within the meaning of the foregoing authorities.

IV.

On page 9 of its brief, Respondent states that,

> " . . . The evidence excluded by the trial court as referred to under this question by petitioner concerned the amount of blood flowing from the injury received by the deceased and whether he was conscious or unconscious after the accident occurred,"

and that,

> " . . . Such evidence was clearly irrelevant to the issues involved and was properly excluded."

It does not state how or why said evidence was irrelevant and cites no authority to support its contention to said effect. The evidence which was excluded under this point, over the objections of Petitioner, was not limited to the amount of blood flowing from the injury, and whether the decedent was conscious or unconscious after the accident. It was responsive to the questions of Petitioner's counsel as to the type of injury inflicted upon her son, the effect of said injury upon him, whether it knocked him unconscious or not, and if uncon-

scious, whether he ever regained consciousness, and whether he died from the blow, etc. (R. 610-614, 232-238: Point VII in Statement of Points on Appeal). In other words, Petitioner sought to show by actual evidence of eye witnesses the manner in which her son was hit by the Respondent's train, the type of injury caused thereby, the effect of the injury upon him, and the fact that it caused his death. She contended that the said evidence and all the surrounding facts and circumstances constituted a very material part of her case; that the fact that the said material evidence might influence the jury against Respondent could not legally be complained of by it, because the said tragedy was caused by the negligence of Respondent, as contended by her and as supported by the evidence; and that Petitioner had a right to argument by her counsel of said evidence to the jury.

Respondent states under this point that:

> "... This Court will not reverse a judgment upon the ground that evidence which was clearly immaterial was excluded in the court below. *National S. S. Co.* vs *Tugman*, 143 U. S. 28; 12 S. Ct. 361."

The case cited is not in point at all on its facts with the case at bar. Petitioner fully recognizes the correctness of the ruling of this Court in that case on the facts there presented, but it has no application whatsoever to the facts under this point in this case. The evidence excluded in this case under this point WAS CLEARLY RELEVANT, MATERIAL, AND COMPETENT, FOR ALL THE REASONS URGED THEREUNDER IN SAID PETITION AND ON THE TRIAL, as revealed by the record (R. 235). The authorities cited under this point on pages 28 and 30 of the Petition for

Certiorari strongly support it. *McCommons* vs. *Williams*, 131 Ga. 313, 62 S. E. 230; *Tifton T. & G. Ry. Co.* vs. *Butler et al.*, 4 Ga. App. 191, 60 S. E. 1078; *Westberry* vs. *State*, 175 *Ga.* 115 (2); *Lellyett* vs. *Markham*, 57 Ga. 13; *Hudson* vs. *Hudson*, 90 Ga. 581 (6); *Georgia Code Section* 105-2002; *Western & Atlantic R. Co.* vs. *Drysdale*, 51 Ga. 645; *Sou. Ry. Co.* vs. *Jordan*, 129 Ga. 665; *Rutland* vs. *Dean*, 60 Ga. App. 806.

Respondent contends on page 9 of its brief that:

> "... No objection was made at trial to the alleged reprimand of petitioner's counsel by the court nor to any of the remarks by the court now herein complained of."

This statement is in direct conflict with the record. Reference to pages 233 through 238 of the record will show that Petitioner's counsel vigorously objected to the ruling of the Trial Court quoted under Point IV, and that on page 235 of the record, he specifically noted an exception thereto. In fact, Petitioner's counsel set forth in detail, outside the presence and hearing of the jury, during the trial, the particulars in which said ruling of the Trial Judge was illegal and prejudicial to Petitioner, as shown by Pages 233 through 238 of the record, as aforesaid.

The case of *Drumm-Flato Commission Co.* vs. *Edmisson*, 208, U. S. 534, 28 S. Ct. 367, cited by Respondent on page 9 of its brief, is not applicable to this case because it specifically states no exception was made and no objections were urged there to the alleged prejudicial remarks of the court, whereas Petitioner's counsel expressly noted exceptions to the alleged prejudicial remarks of the Trial Judge in this case, and set forth in detail, outside the presence of the jury, the particu-

lars in which said remarks were illegal and prejudicial to Petitioner (R. 233-238).

In the case of *Mitchum* vs. *State*, 11 Ga. at page 631, the Supreme Court of Georgia held in part as follows pertaining to the right of a party to argument by counsel of the facts and circumstances in the case:

> "... The right of discussing the merits of his cause, both as to the law and the facts, is indispensable to every party; the same right appertains to his counsel. The range of discussion is wide—very wide ... in his addresses to the Jury it is his right to descant upon the facts proven or admitted in the pleadings; to arraign the conduct of parties; impugn, excuse, justify or condemn motives, so far as they are developed in evidence; assail the credibility of witnesses, when that is impeached by direct evidence, or by the inconsistency or incoherence of his testimony, his manner of testifying, his appearance, or by circumstances. His illustrations may be as various as are the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wing to his imagination."

As stated by the Supreme Court of Georgia in *Garrison* vs. *Wilcoxson*, 11 Ga. at pages 158-9:

> "The duties of the advocate are among the most elevated functions of humanity. Whilst he is the representative of the client's cause, yet these considerations insure an honorable advocacy. His business is to comment on the evidence—to sift, compare, and collate the facts—to draw his illustrations from the whole circle of the sciences—to reason with the accuracy and power of the trained

logician, and enforce his cause with all the inspirations of genius, and adorn it with all the attributes of eloquence."

V.

In addition to the authorities cited in the Petition under this Point, attention is invited to the case of *Moody & Wife* vs. *Davis*, 10 Ga. at pages 411-12, as follows:

"The mandate restrains the Judge from going beyond or outside of the law, AND ENJOINS HIM TO ENFORCE THE LAW . . . HE HAS NO RIGHT AND NO POWER TO WITHHOLD THE APPLICATION OF ONE SINGLE PRINCIPLE OF LAW, TO A SINGLE CASE OVER WHICH HE HAS JURISDICTION; HE HAS NO DISPENSATION, JUSTIFYING OR EXCUSING AN OMISSION TO APPLY THE LAW. . . . *IT IS WHOLLY IMMATERIAL WHETHER A PRINCIPLE OF LAW BE BROUGHT TO HIS NOTICE BY COUNSEL, OR IS SUGGESTED BY HIS OWN KNOWLEDGE AND OBSERVATION.* IF THE PRINCIPLE GROW OUT OF THE CASE, AND BE BELIEVES IT TO BE LAW, HE IS BOUND BY THE RESPONSIBILITIES OF HIS POSITION—BY HIS OFFICIAL OATH—BY THE VERY NATURE OF HIS OFFICE—BY ALL THE EXPEDIENCIES OF JUDICATURE, TO GIVE IT FULL EFFECT."

VI.

Under this point, Respondent contends in its brief that the testimony of Miss Maurita Sutton, objected to by Petitioner's counsel, "was admitted by the court for

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the reason that Petitioner's counsel had himself inquired into that same subject matter in his cross examination of the previous witness and thereby opened the subject for inquiry by respondent's counsel in the examination of subsequent witnesses." This statement is incorrect. Petitioner's counsel did not make an inquiry as to whether her son's fraternity mates warned him of any danger, as claimed by Miss Sutton in her hearsay and argumentative testimony. There was no such issue in the case, and no such question was asked of his fraternity mates or companions on either direct or cross examination. There was no evidence tending to show that the decedent or any of his fraternity mates or companions knew of any danger in using any portion of said platform, upon which they were invited by Respondent. Petitioner did show that Respondent provided no person to control or regulate the crowd on said platform or to warn or protect its invitees thereon from danger in using said platform (R. 427-9). This testimony certainly did not justify the hearsay and argumentative testimony of Miss Sutton objected to. If the said testimony had been offered for impeachment purposes, it would have been necessary for the Respondent's counsel to first lay the foundation by cross-examining the decedent's fraternity mates on this point and securing their denial of making any such statements as those attributed to them by Miss Sutton. They were cross examined at great length by Respondent's counsel, but no questions whatever were asked them about this matter, and no basis was laid to impeach them on this point.

VII, VIII, AND IX.

Respondent contends on pages 11 and 12 of its brief under these points that the Petition for Certiorari contains "serious charges." On pages 12 and 13 of its brief,

it urges this "Court to make a determination from the record satisfactory to itself as to whether there is any basis for the serious charges as made and if the Court finds no basis for such charges that it order the scandalous and defamatory remarks stricken from petitioner's brief in accordance with Rule 40(5) and that the Court issue such further orders in the premises deemed necessary and appropriate to prevent a recurrence in the future of such reckless and irresponsible charges by petitioner or her counsel."

If the errors of the Trial and Appellate Courts presented in the Petition for Certiorari, which are strongly supported by the record, constitute serious charges, as contended by Respondent, they would certainly seem to require the grant of the Writ to clarify the matter. It will be noted that the Respondent does not urge this Court to do anything if it should find from the record that there is any basis for what it terms the "serious charges made" in the Petition for Certiorari, but only if it finds from the record that there is no basis for the charges. Furthermore, Respondent adjudges Petitioner's contentions, as quoted from her Petition on pages 11 and 12 of its brief, as "scandalous and defamatory" regardless of what determination might be made of them by this Court from the record. How could the contentions of Petitioner as to the alleged grave errors committed against her be "scandalous and defamatory" if this Court should find they are supported by the record and the applicable and controlling authorities cited in her Petition?

Respondent does not point out any error in any of the contentions of Petitioner as to the illegal, unjust, and unconstitutional rulings and decisions rendered against her in this case, or any particular in which the grounds relied upon for the grant of the writ of cer-

tiorari are not exactly in accordance with the record and the applicable and controlling authorities cited by her. Reference to the record and the authorities cited by Petitioner will show that they strongly support the contentions in her Petition for Certiorari.

In presenting the serious errors committed by the lower Courts, of a fatally prejudicial nature to Petitioner in this case, as revealed by the Questions in the Petition for Certiorari and supported by the record, her counsel have only done their legal duty as lawyers and as officers of the Court.

Section 15 of the Canons of Professional Ethics of the American Bar Association, as adopted by the *Georgia Bar Association* on June 4, 1909, and amended 1930, provides in part as follows:

> "The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. IN THE JUDICIAL FORUM THE CLIENT IS ENTITLED TO THE BENEFIT OF ANY AND EVERY REMEDY AND DEFENSE THAT IS AUTHORIZED BY THE LAW OF THE LAND, AND HE MAY EXPECT HIS LAWYER TO ASSERT EVERY SUCH REMEDY OR DEFENSE . . ." (Page 284 of Report of Forty-Seventh Annual Session of Georgia Bar Association.)

In the case of *Moody & Wife*, vs. *Davis*, 10 Ga., beginning at page 410, the Supreme Court of Georgia held in part as follows:

"IT IS UNQUESTIONABLY THE RIGHT AND DUTY OF COUNSEL TO BRING TO THE VIEW OF THE COURT, FOR ITS DETERMINATION, ANY POINT OF LAW, WHICH PROPERLY SPRINGS OUT OF THE CAUSE, AND WHICH THEY MAY THINK IMPORTANT FOR THE INTEREST OF THEIR CLIENTS. THEY ARE IN COURT FOR THAT PURPOSE; THEY ARE BOUND TO OBSERVE CLOSELY, TO LABOR DILIGENTLY AND TO KNOW THOROUGHLY, IN ORDER THAT THEY MAY SECURE THE DETERMINATION OF THE RIGHTS OF THEIR CLIENT, ACCORDING TO LAW. . . . It is therefore, the duty of counsel to present to the Court the points which he conceives are in favor of his client, and it is his right to be heard in argument to sustain them; if they grow out of the case. . . . If he (the judge) declines to pass upon a principle thus moved, and it springs out of the case, such declining is error, and if an appellate tribunal finds it in favor of the party moving it, a new trial will be awarded. As officers of the Court, the duties of counsel are not in conflict with those which devolve upon him as the representative of a party. They are the friends of the Court, enlisted with him in the sublime work of discovering truth, and dealing out justice between man and man. . . . Whilst judgment belongs alone to the Judge—enlightenment is the province of the lawyer, and I apprehend that no Judge can be found so presumptuously vain, or so flagrantly unjust, as not to recognize, and that too with grateful emotions, the aid which he derives, in the discharge of duties more solemn than belong to any other functionary, from an able bar. . . . It is the duty of the Judge to enforce the laws of the State, made in accordance with the

State and Federal Constitutions—the whole law, as it applies in his judgment, to the cases which come before him. He has no right and no power to withhold the application of one single principle of law, in a single case over which he has jurisdiction, he has no dispensation, justifying or excusing an omission to apply the law. He is not presumed, of course, to be infallible, and hence he is not liable to an action for any judgment which he may, in good faith, render in a cause over which he has jurisdiction. He is presumed to be fallible; else why provide, not only that he shall correct his own errors by a power to grant new trials, but, also, that they shall be corrected by others, by organizing Courts of Review. The presumption demands diligence to know, and diligence to apply the law—patience and painstaking to master the facts of the case and to ascertain upon what principle the right between the parties depends. With all the aid that counsel can give him, and without aid from counsel, he is bound to labor to ascertain and find the truth of the law.

CONCLUSION

As stated in the beginning of this brief, the substantial Federal Questions presented in the Petition for Certiorari, as supported by the record and the applicable and controlling law, show the jury would have been forced to find a verdict for Petitioner if it had not been tampered with in the particulars revealed by her Motion under Rule 60(b) and if the Trial Judge had not committed the serious reversible errors of a fatally prejudicial nature to her as set forth in said Questions. In this connection, attention is invited to the decision of this Court in *Hodges* vs. *Easton*, 106 U. S. 412, 1 S. Ct. at pp. 310-311, holding in part as follows:

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"IT WAS THE PROVINCE OF THE JURY TO PASS UPON THE ISSUES OF FACT, AND IT WAS THE RIGHT of the defendants, SECURED BY THE CONSTITUTION OF THE UNITED STATES, TO HAVE THEM DO SO. That right could have been waived, BUT IT COULD NOT BE TAKEN FROM THEM BY THE COURT . . . THE COURT COULD NOT CONSISTENTLY WITH THE CONSTITUTIONAL RIGHT OF TRIAL BY JURY, submit a part of the facts to the jury, AND ITSELF, DETERMINE THE REMAINDER WITHOUT A WAIVER BY THE DEFENDANTS OF A VERDICT BY THE JURY. IN CIVIL CASES, other than those in equity and admiralty, and except where it is otherwise provided in bankruptcy proceedings, 'THE TRIAL OF ISSUES OF FACT' — 'IN THE CIRCUIT COURTS SHALL BE BY JURY,' UNLESS THE PARTIES, OR THEIR ATTORNEYS OF RECORD, STIPULATE IN WRITING FOR THE WAIVER OF A JURY . . . There is no such stipulation in this case, and there is nothing in the record from which such stipulation or waiver may be inferred. IT HAS BEEN OFTEN SAID BY THIS COURT THAT THE TRIAL BY JURY IS A FUNDAMENTAL GUARANTY OF THE RIGHTS AND LIBERTIES OF THE PEOPLE. Consequently, every reasonable presumption should be indulged against its waiver. For these reasons the judgment below must be reversed."

As pointed out in the Petition for Rehearing in the Court of Appeals (R. 665), a trial by a jury, which has been fixed or tampered with, and where there has been misconduct on the part of at least some of the jurors of a prejudicial nature to Petitioner, or Appellant, as shown by positive and uncontradicted proof in the case at bar, does not constitute a jury trial in the sense guar-

anteed by the Seventh Amendment of the Constitution. Such a trial by such a jury is worse than no trial at all, and a verdict rendered by such a jury is utterly void.

It is respectfully urged that the substantial Federal Questions of grave and public concern presented by the Petition for Certiorari and supported by the authorities therein cited and this Reply Brief, as well as the record, demand the grant of the Writ of Certiorari to the Court of Appeals for the Fifth Circuit to review, correct, and reverse its erroneous decision and judgment in this case. It is further urged that Respondent's brief tends to strengthen the foregoing contention of Petitioner. It is firmly believed this case falls within the provisions of Rule 19(1(b)) of the revised Rules of this Court and its decisions setting forth the special and important reasons calling for the exercise by this Court of its power of supervision by the grant of the Writ of Certiorari.

Respectfully submitted,

.....

G. SEALS AIKEN
Attorney for Petitioner in Certiorari

.....

BEN F. SWEET
of Counsel.

ACKNOWLEDGMENT OF SERVICE

Service is hereby acknowledged and copy received of the foregoing Reply Brief of Petitioner in Certiorari.

This the.....day of Sept., 1954.

.....

COUNSEL FOR RESPONDENT

FILED
NOV 30 1954
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1954

NO. 258

MRS. AARON (CELIA) FUNK,
Petitioner in Certiorari,

VS.

SEABOARD AIR LINE RAILWAY COMPANY,
Defendant in Certiorari.

PETITION OF MRS. AARON (CELIA) FUNK FOR REHEARING OF ORDER OF OCTOBER 14, 1954 DENYING HER PETITION FOR CERTIORARI.

G. SEALS AIKEN
1105-6 First National Bank Building
Atlanta 3, Georgia
Attorney for Petitioner

BEN F. SWEET
1114 Hurt Building
Atlanta 3, Georgia
of Counsel

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IN THE

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OCTOBER TERM 1954

NO. 258

MRS. AARON (CELIA) FUNK,
Petitioner in Certiorari,

VS.

SEABOARD AIR LINE RAILWAY COMPANY,
Defendant in Certiorari.

PETITION OF MRS. AARON (CELIA) FUNK FOR REHEARING OF ORDER OF OCTOBER 14, 1954 DENYING HER PETITION FOR CERTIORARI.

MRS. AARON (CELIA) FUNK, the Petitioner above named, presents this her Petition for a Rehearing of the order of this Honorable Court of October 14, 1954, denying her Petition for Certiorari, and prays that the said order be reversed and that the Writ of Certiorari be granted, as required by Amendments V and VII of the U. S. Constitution and Section 1254(1) of 28 U. S. C. A., and Rule 19(b) of this Court.

Petitioner's case is based upon the gross negligence of the Appellee railroad in killing her minor son by violently striking his head and fracturing his skull with the overhang of the side of its streamline train, Silver Comet, while he was an invitee on its platform erected and maintained by said railroad at its Emory University, Georgia, station for its passengers and in-

vitees. The uncontradicted evidence shows that the overhang of Appellee's said train traversed 26 or 27 inches of its said platform.

The petition for Certiorari seeks a review and reversal of the judgment of the U. S. Court of Appeals for the Fifth Circuit upholding the judgment of the U. S. District Court in Atlanta, Georgia, for Appellee. The Petition shows the jury which tried Petitioner's case was contacted, tampered with, and corrupted by some unknown person or persons, during the trial of her case, contrary to law and contrary to the general instructions of the Trial Court. It shows she was deprived of a jury trial in this manner and in other vital respects, in violation of Amendment V of the U. S. Constitution. It also shows she was deprived of her property to the extent of $250,000 without due process of law, in violation of Amendment VII of the U. S. Constitution in the grave particulars of great public concern specified therein.

IT IS FIRMLY BELIEVED THAT THE PETITION FOR CERTIORARI WAS DENIED BY THIS COURT THROUGH INADVERTENCE BECAUSE IT PRESENTS, BEYOND ANY QUESTION OR DOUBT, SUBSTANTIAL FEDERAL QUESTIONS BRINGING THE CASE CLEARLY WITHIN THE MANDATORY AND CONSTITUTIONAL JURISDICTION OF THIS COURT, AND REQUIRES A REVERSAL OF THE DECISION OF THE U. S. COURT OF APPEALS FOR THE FIFTH CIRCUIT OF APRIL 30, 1954, AS ADHERED TO ON JUNE 10, 1954, AS A MATTER OF ABSOLUTE FEDERAL CONSTITUTIONAL RIGHT, FOR THE REASONS SET FORTH BRIEFLY HEREIN.

I.

The decision and judgment of the Court of Appeals for the Fifth Circuit in this case are in direct conflict with that of the Eighth Circuit in the case of *Thompson* vs. *Anderson*, 138 Fed. 2nd 272, in that the Eighth Circuit held, in a death action like this, based upon the theory that the train was driven by the station at such speed that suction of wind caused deceased to lose his balance and fall under the train, that the negligence of the railroad and contributory negligence of the deceased were questions for the jury; that is was clear from all the evidence that a fast moving train causes a disturbance in the air as it passes; and that in cases of injury to persons lawfully on station platforms, as a result of suction or wind, from a rapidly passing train, the courts have generally held that the questions of negligence and contributory negligence were for the jury, and have assumed that recovery for such an injury is not precluded on the ground that it should not reasonably be anticipated; whereas, the Fifth Circuit in this case, in which the evidence pertaining to said matter was even more favorable to Petitioner, refused to allow the jury to consider and pass upon this question, but approved the charge of the District Trial Judge as follows:

> "The appellant also claims that the court's charge to the jury on the issue of suction was equivalent to charging that there could be no recovery based on suction. The charge, in substance, was that if under the operation of natural laws the Appellee should have anticipated that the Appellant's son would probably be sucked into the train because of an existing condition, not due to any negligence on the part of Appellee, then the decedent would likewise be bound to anticipate

> the same result; but that, if the happening was unusual and extraordinary, and not brought about by any negligence of the railroad, and the Appellant's son could not have anticipated such result, then neither could the railroad be expected to anticipate it. We think these instructions to the jury were not subject to the objections urged against them."

The said charge, approved by the Fifth Circuit, was also in direct conflict with the Georgia Law on a very important State question, as shown by the following authorities:

Western & Atlantic Ry. Co. vs. *Wright*, 79 Ga. App. 733, 64 S. E. 2nd 655;

Atlantic & B. Ry. Co. vs. *Owens*, 123 Ga. 393, 51 S. E. 404;

Coffer et al. vs. *Bradshaw, et al.*, 46 Ga. App. 143, 167 S. E. 119;

Collier vs. *Pollard*, 60 Ga. App. 105, 2 S. E. 2nd 821; and

Georgia Code Sections 94-1108 and 105-401.

In the case at bar, the evidence shows without contradiction that Petitioner's son was upon the platform where he was invited by the Defendant to be in meeting its train, and about two feet from the edge of the platform, at the time he was hit by its train and fatally injured; that the overhang of said train traversed at least 26 or 27 inches of the surface of said platform; and that there was no separation of the platform from the roadbed of the main track and no railings or curbs or marks or anything else to indicate that any part of said platform was dangerous.

The strong similarity between the facts in the case at bar and those in the case decided by the Eighth Circuit in *Thompson* vs. *Anderson*, Supra, is set forth on pages 22-23 of the Petition for Certiorari, to which special attention is invited.

II.

The Court of Appeals for the Fifth Circuit has decided in this case an important State question in a way in conflict with applicable State Law, in upholding a charge of the U. S. District Trial Court to the jury that employees of the Defendant in charge of the operation of its train had a right to assume that Petitioner's son was a rational human being and would exercise reasonable care for his own protection while standing or walking along the platform upon which he was invited by Defendant, as its train passed by, and that there was no legal duty on the part of the servants of the Defendant in charge of its train to anticipate that Petitioner's son would, if he was in an apparent place of safety on the platform beside the track, move in a moment or so to an unsafe place on the platform nearer the train.

This charge was entirely inapplicable to petitioner under the facts and circumstances in this case and was fatally prejudicial to her because the uncontradicted evidence shows that her son was upon the platform erected and maintained by the Defendant for the use of its invitees in meeting or boarding or alighting from its trains, at the time he was hit by its train and fatally injured; that the overhang of the Defendant's said train traversed 26 or 27 inches of the surface of said platform; that there was no separation of the platform from the roadbed of the main track; and

that there were no railings or curbs or marks or anything else to indicate that any part of the platform was dangerous.

The said charge was in direct conflict with the applicable and controlling law of Georgia, as set forth in the following authorities:

Atlantic & B. Ry. Co. vs *Owens*, 123 Ga. 393, 51 S. E. 404;

Coffer et al. vs. *Bradshaw et al.*, 46 Ga. App. 143, 167 S. E. 119;

Collier vs. *Pollard*, 60 Ga. App. 105, 2 S. E. 2nd 821; and

Georgia Code Sections 94-1108 and 105-401.

These authorities hold in substance that one who expressly or impliedly invites another upon his premises is bound to see that they are in such condition that the person invited may approach and remain thereon in safety; that a railroad company owes a duty to keep its passenger station in SAFE condition not only to those who come there for the purpose of embarking upon trains, or those who use the station in alighting from trains, but also to those who resort there for the purpose of meeting passengers; that it was the duty of the Defendant to protect Petitioner's son as its invitee upon its platform, from traps, pitfalls, and hidden dangers, and to guard, cover, or protect dangerous places or instrumentalities for his safety; and that where damages are proved to have resulted by the operation of the cars of a railroad company, a presumption of negligence arises against the railroad company as to each of the negligent acts charged in the petition, and the plaintiff is en-

titled to recover the damages proved on such a prima facie case, UNLESS THE DEFENDANT SHALL CARRY THE BURDEN OF SHOWING THAT THE DAMAGE WAS DONE BY THE CONSENT OF THE INJURED PERSON, OR WAS CAUSED BY HIS NEGLIGENCE, OR THAT THE DEFENDANT WAS NOT ACTUALLY GUILTY OF THE NEGLIGENCE CHARGED, OR, IF SO, THE INJURED PERSON COULD HAVE AVOIDED ITS CONSEQUENCES BY THE EXERCISE OF ORDINARY CARE AFTER IT HAD OR SHOULD HAVE BECOME APPARENT, AND THAT EVEN IF THE INJURED PERSON WAS NEGLIGENT AND SAID NEGLIGENCE CONTRIBUTED IN SOME DEGREE LESS THAN THAT OF THE DEFENDANT, RECOVERY WOULD STILL BE AUTHORIZED IN AN AMOUNT DIMINISHED IN PROPORTION TO SUCH CONTRIBUTORY NEGLIGENCE.

UNDER THE UNCONTRADICTED FACTS AND CIRCUMSTANCES AND THE APPLICABLE AND CONTROLLING GEORGIA AUTHORITIES, AS BRIEFLY SET FORTH UNDER THIS POINT, A VERDICT AND JUDGMENT FOR PETITIONER IN SOME AMOUNT WERE DEMANDED.

The charge excepted to under this point ALLOWED THE JURY TO SPECULATE WHETHER PETITIONER'S SON WAS OR WAS NOT A RATIONAL HUMAN BEING, AS IF THE RAILROAD COULD BE RELIEVED OF THE DUTY OF EXERCISING ORDINARY CARE TO MAINTAIN SAFE AND EFFICIENT RAILWAY STATIONS AND PLATFORMS IF SOME OF ITS PASSENGERS OR INVITEES WERE LESS THAN RATIONAL IN MIND.

This Court and the Appellate Courts of Georgia have repeatedly held that charges to juries must be confined to the issues and must be predicated on facts in issue. *Wilmington Star Mining Co.* vs. *Fulton*, 204 U. S. 60, 27 S. Ct. 412; *Chicago R. I. & P. R. Co.* vs. *Houston*, 95 U. S. 697; *Howard* vs. *Milwaukee, St. P. R. Co.*, 101 U. S. 837; *Gorman* vs. *Campbell*, 14 Ga. 137; *Gaskins* vs. *Gaskins*, 145 Ga. 806, 89 S. E. 1080; *Fuller* vs. *Stone*, 207 Ga. 355, 61 S. E. 2nd 467.

This charge was given in response to a written request by Defendant and should have been refused because it was not adjusted to or supported by the evidence in this case, was entirely inapplicable, and because it violated the rule laid down by this Court in *Grand Trunk Ry. Co. of Canada* vs. *Ives*, 144 U. S. 408, 12 S. Ct. 679, quoting a somewhat similar erroneous request to charge, which was refused in that case, and holding as follows:

> "The reason given by the court for refusing this request was that 'it is too much upon the weight of the evidence, and confines the jury to the particular circumstance narrated, without notice of others that they may think important.' This reason is a sound one."
>
> "In determining whether the deceased was guilty of contributory negligence the jury were bound to consider all the facts and circumstances bearing upon that question, AND NOT SELECT ONE PARTICULAR PROMINENT FACT OR CIRCUMSTANCE AS CONTROLLING THE CASE TO THE EXCLUSION OF ALL THE OTHERS. . . ."

To use the language of this Court in *Brown* vs. *Western Railway of Alabama*, 338 U. S. 294, 70 S. Ct. 105, "Here the" U. S. Court of Appeals for the Fifth Cir-

cuit "has decided as a matter of law that no inference of railroad negligence could be drawn from the facts alleged" and proven "in this case," but, "Rather the court itself has drawn from the pleadings" and the evidence "the reverse inference that the sole proximate cause of Petitioner's" son's "injury was his own negligence," and that, "Throughout its opinion the appellate court clearly reveals a preoccupation with what it deemed to be petitioner's" son's "failure to take proper precautions." This Court reversed that case with the statement "that petitioner should be allowed to try his case." The same principles should be applied to this case.

The erroneous and inapplicable charge complained of under this point had the effect of depriving Petitioner of the jury trial guaranteed to her by Amendment VII and of due process of law guaranteed to her by Amendment V of the U. S. Constitution.

III.

The Court of Appeals for the Fifth Circuit in this case has decided a very substantial Federal question in a way in conflict with the applicable decisions of this Court in the cases of *Universal Oil Products Co.* vs. *Root Refining Company*, 328 U. S. 473, 66 S. Ct. 1176, and *Hazel-Atlas Glass Company* vs. *Hartford Empire Company*, 322 U. S. 238, 64 S. Ct. 996, in that it affirmed the U. S. District Court in not granting the Motion of Petitioner under Rule 60(b) of the Federal Rules of Civil Procedure to relieve her of its order of January 21, 1953, overruling her Motion for new Trial, because her said verified Motion under Rule 60(b), supported by an accompanying affidavit, showed that at least some of the jurors were contacted

during the trial by some unknown person or persons and corrupted, by being given false and extraneous communications of a fatally prejudicial nature to Petitioner, and that at least one of the jurors was guilty of gross misconduct of a very prejudicial nature to Petitioner, all in the particulars revealed by her said verified Motion and accompanying affidavit.

Under the above stated decisions of this Court, it was the duty of the District Trial Judge to set aside the verdict and judgment secured against Petitioner through fraud upon the Court, as revealed by her said Motion under Rule 60(b), and, upon the failure of said Court to do so, it became the mandatory duty of the Court of Appeals for the Fifth Circuit upon Petitioner's Appeal to do so. As forcibly indicated by this Court in the case of *Hazel-Atlas Glass Company* vs. *Hartford Empire Co.*, Supra, the Circuit Court in that case not only had the power but also MANDATORY DUTY TO VACATE A JUDGMENT SECURED THROUGH FRAUD UPON THE COURT. It held that every element of the fraud there disclosed demanded the exercise of the historic power of equity to set aside fraudulently begotten judgments. It further held:

> "THIS MATTER DOES NOT CONCERN ONLY PRIVATE PARTIES. THERE ARE ISSUES OF GREAT MOMENT TO THE PUBLIC ... FURTHERMORE, TAMPERING WITH THE ADMINISTRATION OF JUSTICE IN THE MANNER INDISPUTABLY SHOWN HERE INVOLVES FAR MORE THAN AN INJURY TO A SINGLE LITIGANT. IT IS A WRONG AGAINST THE INSTITUTIONS SET UP TO PROTECT AND SAFEGUARD THE PUBLIC, INSTITUTIONS IN WHICH FRAUD CANNOT

COMPLACENTLY BE TOLERATED CONSISTENTLY WITH THE GOOD ORDER OF SOCIETY."

As also stated by this Court in the case of *Universal Oil Products Co.* vs. *Root Refining Co.*, Supra, citing with approval and following *Hazel-Atlas Glass Co.* vs. *Hartford Empire Company*, Supra:

> "The power to unearth such a fraud is the power to unearth it effectively"; that, "Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation"; and that, "No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that THE VERY TEMPLE OF JUSTICE HAS BEEN DEFILED, the entire cost of the proceedings could justly be assessed against the guilty parties."

As shown by the Petition for Certiorari in this case, the District Trial Judge took no action whatever to unearth the serious fraud upon the Court revealed by Petitioner's verified Motion under Rule 60(b) and accompanying affidavit. This Point was either entirely overlooked or ignored by the Court of Appeals upon appeal, despite the fact that the said charge of fraud upon the Court was positively established by prima facie proof in Petitioner's said Motion under Rule 60(b), presenting a very grave error of great public concern in a case where the evidence shows Petitioner's son was killed through the gross negligence of the Defendant and the jury returned a verdict for said Defendant, in violation of its oath and duty to decide the case according to the evidence and the law applicable thereto.

Section 1503 *of* 18 *U. S. C. A.* expressly provides that:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede . . . any grand or petit juror, or officer in or of any court of the United States . . . in the discharge of his duty . . . or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

In the case of *Broadbent* vs. *U. S.*, 149 Fed. 2nd 580, the U. S. Court of Appeals held that any endeavor to impede and obstruct justice falls within the connotation of the word, "corruptly," as used in the above quoted Section.

IN THE CASE OF *SINCLAIR ET AL.* vs. *U. S.*, 279 U. S. 749, 49 S. Ct. 471, THIS COURT HELD THAT THE JURY IS AN ESSENTIAL INSTRUMENTALITY — AN APPENDAGE — OF THE COURT; THAT THE EXERCISE OF CALM AND INFORMED JUDGMENT BY ITS MEMBERS IS ESSENTIAL TO PROPER ENFORCEMENT OF LAW; AND THAT THE MERE SHADOWING OF THE JURY, WITHOUT ACTUAL CONTACT WITH ANY MEMBER THEREOF, TENDED TO OBSTRUCT THE HONEST AID FAIR ADMINISTRATION OF JUSTICE, AND THEREFORE CONSTITUTED CONTEMPT OF COURT.

As stated by the Court of Appeals of Georgia in *Temples* vs. *Central of Georgia Railway Co.*, 15 Ga. App. 114, 82 S. E. 777,

"AN IMPARTIAL JURY IS THE CORNERSTONE OF THE FAIRNESS OF TRIAL BY JURY," AND "THE COURT SHOULD NOT REFUSE TO AWARD A LITIGANT THAT TO WHICH HE WAS ENTITLED, AND OF WHICH HE HAD BEEN DEPRIVED IN THE FIRST INSTANCE — A FAIR AND IMPARTIAL TRIAL."

In the case of *Berry* vs. *Georgia*, 10 Ga. at page 525, the Supreme Court of Georgia held:

"THE ADMINISTRATION OF JUSTICE SHOULD NOT ONLY BE PURE, BUT ABOVE SUSPICION . . . although the separation (of the jury) in this case was by the authority of the Court, and upon the consent of counsel, yet, IF THE DEFENDANT COULD HAVE SHOWN THAT ANY IMPROPER COMMUNICATION HAD TAKEN PLACE BETWEEN ANY OF THE JURY AND OTHER PERSONS DURING THEIR DISPERSION, WE SHOULD HAVE HELD IT GOOD CAUSE FOR AWARDING A NEW TRIAL. . . ."

IV.

This point shows the Court of Appeals in this case has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, and has decided an important State question in a way in conflict with applicable State Law, in the particulars set forth in said Point, as to call for an exercise of this Court's power of supervision. It shows the Trial Court excluded the very material evidence therein quoted pertaining to the manner in which the Defendant train struck and fatally injured Petitioner's son, the effect of the impact of the train upon his person, and that it caused his

death. It also shows the Trial Court reprimanded Petitioner's counsel for offering said material and competent evidence in support of her case, and made the improper statements therein quoted of a fatally prejudicial nature to her.

In the case of *McCommons* vs. *Williams*, 131 Ga. 313, 62 S. E. 230, the Supreme Court of Georgia held that if evidence is admissible on behalf of a party for any purpose, though its effect on the opposite party's case may be serious, this will not make its admission erroneous as being irrelevant.

In the case of *Tifton T. & G. Ry. Co.* vs. *Butler, et al.*, 4 Ga. App. 191, 60 S. E. 1087, the Court of Appeals of Georgia held that testimony is admissible which tends to prove a fact alleged in the petition, whether it tends to establish the right to recover or not; that testimony tending to dispute the facts set up by Defendant as a defense or to avoid the legal effect of them is admissible; and that evidence which tends to establish any part of the Plaintiff's case or to dispute any of the defenses thereto is admissible.

In the case of *Westberry* vs. *State*, 175 Ga. 115(2), the Supreme Court of Georgia held that testimony describing wounds inflicted upon a person killed, and showing there were blood stains on the shirt worn by said decedent were admissible.

The illegal and improper remarks by the Trial Court of a prejudicial nature to Petitioner complained of in said point are quoted as follows:

> ". . . the reason the Court is excluding that is because counsel for the defendant has stated in open court that he admits that the cause of the death was the occasion under investigation. NOW

YOU REPEATEDLY IN THE PRESENCE OF THE JURY UNDERTAKE TO PROVE THE EXTENT OF HIS INJURIES. THIS DEPOSITION SPEAKS OF HIS GASPING FOR BREATH AND THE POOL OF BLOOD THAT ACCUMULATED UNDER HIS HEAD. THAT IS INCLINED TO BE INFLAMMATORY, and when it is objected to as being, as not illustrating any issue in the case after the counsel for the defendant has stated in open court that they admit that the injuries received there on that day were the cause of his death, then I think that the objections are good, that it is inflammatory, THAT IT TENDS SIMPLY TO MAKE THE JURY TRYING THE CASE VISUALIZE THE HORRIBLE EXTENT OF THE INJURIES, AND THAT IT REALLY ILLUSTRATES NO ISSUE THAT IS IN THE CASE. NOW, I THINK YOU HAVE UNDERSTOOD THE REASON FOR THE RULING AT ALL TIMES, AND I HAVE RULED THAT REPEATEDLY. I THINK IT IS THE LAW, BUT WHETHER IT IS THE LAW OR NOT, I HAVE RULED THAT IT IS, AND I WILL ASK YOU TO RESPECT IT IN THE FUTURE."

In the case of *Lellyett* vs. *Markham*, 57 Ga. 13, the Supreme Court of Georgia held that improper remarks by the Trial Judge harmful to the losing party constitute ground for a new trial, even though the judge admonished the jury to disregard said remarks, and that the improper criticism of counsel or a witness by the judge is likewise ground for new trial. See also *Hudson* vs. *Hudson*, 90 Ga. 581(6).

The said highly improper and prejudicial remarks made by the Trial Judge, as quoted above, in ruling out the material evidence offered, and in reprimanding Petitioner's counsel for offering it, were more injuri-

ous to her in the consideration of the jury than the rejection of the evidence itself. His quoted remarks necessarily gave the jury the false impression that her counsel was guilty of very wrongful acts in seeking to present this material evidence to the jury; that it was incompetent, inflammatory, and prejudicial to the Defendant; that her counsel had no right to present by evidence or argument to the jury "THE HORRIBLE EXTENT OF THE INJURIES," and that the jury had no right to consider the same. This meant, in effect, that the jury could not consider the negligent manner in which the Defendant injured Petitioner's son or the fatal effect of the serious injuries it inflicted upon him. The Trial Judge had no right under the law to minimize, in the consideration of this case by the jury, the serious and fatal effect of the gross negligence of the Defendant in killing Petitioner's son or any of the material or surrounding facts and circumstances pertaining to said matter. The evidence presented under this point was not only relevant and material in support of the very basis of Petitioner's action for the negligent homicide of her son, but it was also admissible under *Georgia Code Section* 105-2002, providing that:

> "In every tort there may be aggravating circumstances, either in the act or in the intention, and in that event, the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff."

See also in this connection:

Western & Atlantic R. Co. vs. *Drysdale*, 51 Ga. 645; *Southern Ry. Co.* vs. *Jordan*, 129 Ga. 655; and

Rutland vs. *Dean*, 60 Ga. App. 896.

The said illegal rulings and comments of the Trial Judge of a highly prejudicial nature to Petitioner severely and illegally restricted Petitioner's counsel in his argument to the jury of her case. They prevented him from discussing or condemning the motives of the Defendant in denying in its pleadings that its train killed her son, and in seeking to prevent proof by Petitioner's witnesses on the trial that its said denial was false. In the case of *Mitchum* vs. *State*, 11 Ga. at page 615, the Supreme Court of Georgia expressly held that counsel for a party, "in his address to the jury," has the "right to descant upon the facts proven or admitted in the pleadings; to arraign the conduct of parties; impugn . . . or condemn motives, so far as they are developed in evidence. . . ."

In the case of *Garrison* vs. *Wilcoxson*, 11 Ga. at page 158, the Supreme Court of Georgia also held in part as follows:

> ". . . PARTIES HAVE A RIGHT TO APPEAR BY COUNSEL, AND IT IS THE PRIVILEGE OF COUNSEL TO ADDRESS THE JURY ON THE FACTS. IF THE JURY ARE TO DISREGARD THE ARGUMENT OF COUNSEL ALTOGETHER — IF THEY ARE TO SHUT THEIR EARS TO THEIR ILLUSTRATIONS, COMMENTS AND REASONINGS, HOW UNMEANING, INDEED HOW ABSURD IS THE APPEARANCE OF COUNSEL! It is a most valuable right to be represented by learned and eloquent counsel, not only before the Court, as to the law, but also before the Jury, as to the facts.
>
> "It means something—it is a guarantee against the encroachments of power upon the personal rights of the citizen. It is, in this country, no mean privilege. So far as the facts of a case are concerned, the privilege is valuable, just because

the Jury may look to the argument of counsel — may consider his reasoning, before making up their verdict. . . . THE DUTIES OF THE ADVOCATE ARE AMONG THE MOST ELEVATED FUNCTIONS OF HUMANITY. Whilst he is the representative of his client's cause, yet these considerations insure an honorable advocacy. HIS BUSINESS IS TO COMMENT ON THE EVIDENCE—TO SIFT, COMPARE AND COLLATE THE FACTS — TO DRAW HIS ILLUSTRATIONS FROM THE WHOLE CIRCLE OF THE SCIENCES — TO REASON WITH THE ACCURACY AND POWER OF THE TRAINED LOGICIAN, AND ENFORCE HIS CAUSE WITH ALL THE INSPIRATIONS OF GENIUS, AND ADORN IT WITH ALL THE ATTRIBUTES OF ELOQUENCE . . . IT IS THE BUSINESS OF THE JURY TO LISTEN, TO BE INFORMED . . . THEY SIT, THE SWORN ARBITERS OF THE CAUSE, BOUND BY THE MOST SOLEMN SANCTIONS, TO DO JUSTICE BETWEEN THE PARTIES, ACCORDING TO THE EVIDENCE."

V.

This Court has apparently overlooked this Point in considering the Petition for Certiorari. It is based upon the refusal of the Trial Judge to require the Defendant's fireman and main witness, Will Garlington, to answer material and proper questions on cross examination, the reprimand by said Judge of Petitioner's counsel for asking said proper questions, and comments by him of a very prejudicial nature to her, all in the presence and hearing of the jury, as set forth in detail on pages 614-7 of the Record and very briefly on pages 10 through 12 of the Petition for Certiorari. It is also based upon the failure and refusal of the Trial Judge to reprimand said witness for making speeches to the

jury and the Presiding Judge of a very prejudicial nature to Petitioner, in failing to rule out said incompetent and prejudicial matter, and in complementing said witness while violating the rules of evidence and proper decorum in the court room, as set forth in the record and the Petition under this Point on the pages indicated.

Inasmuch as this witness was the fireman of the Defendant on the train which hit Petitioner's son and the only witness of the Defendant who claimed he saw the impact, and his evidence as to how Petitioner's son was hit was in conflict with the testimony of all the other witnesses, the errors of the Trial Court under this Point were extremely prejudicial to Petitioner. In fact, the Court of Appeals based its decision upon the testimony of this witness, as pointed out on page 12 of the Petition for Certiorari.

Petitioner's position on this point is supported by the cases of:

Alexander vs. *State*, 114 Ga. 266, 40 S. E. 231;

Lellyett vs. *Markham*, 57 Ga. 13;

Mitchum vs. *State of Georgia*, 11 Ga. 634-5; and

Moody & Wife vs. *Davis*, 10 Ga. at pages 411-12.

VI.

This Court apparently overlooked this point because it shows the Trial Court allowed a Miss Maurita Sutton, witness for the Defendant, to give hearsay and argumentative evidence of a very prejudicial nature to Petitioner and in violation of the rules of evidence. This incompetent testimony was adopted by the Court

of Appeals in its decision, as pointed out on page 13 of the Petition for Certiorari.

This Point is strongly supported by:

Rushin vs. *State*, 63 Ga. App. 646, 11 S. E. 2nd 844-5, and

Foster vs. *Atlanta Rapid Transit Co.*, 119 Ga. 675, 46 S. E. 840.

CONCLUSION

It is firmly believed the foregoing grave questions of great public concern have been overlooked by this Honorable Court in the pressure of work to which it is subjected, for the following reasons as well as many others which are apparent from a mere reading of the questions presented.

If a verdict rendered by a jury, which has been fixed or corrupted or tampered with in utter defiance of the law and of the general instructions of the Trial Judge, can be upheld, then a jury trial becomes a mockery and a fraud upon the litigant who suffers therefrom as well as the public who pays the necessary taxes to maintain the jury system. Unless such a practice can be exposed and stopped by the setting aside of a verdict rendered by such a jury under such circumstances, our courts will lose the confidence of the people and justice will become a myth. The great progress toward equal and full justice to every person which has been made over centuries of trial and error and through great sacrifices will be completely lost and our country will suffer the same disastrous fate of the great nations of the past which have abandoned liberty and justice for tyranny and injustice.

If the forms of law can be abandoned and the rules

of evidence applicable to and controlling a litigant's case can be disregarded, as was done toward Petitioner in this case in the particulars shown by the Petition for Certiorari, a trial by a jury will become a tragic farce and a fraud upon the injured party as well as the public. A verdict rendered by a jury which has been corrupted or tampered with during the trial (such as the verdict appealed from in this case) is entitled to no more respect than a notorious Hitler plebiscite where about 98 per cent of the electorate always voted for Hitler due to the awe and persuasion of his bayonets and bullets, and the other 2 per cent voted to the contrary at his instance to give the election the false appearance of a bona fide expression of the will of the helpless victims of his "protective (?) custody."

If a trial judge can severely reprimand the aggrieved party's counsel in the presence and hearing of the jury, while doing his duty to his client and while submitting very material evidence in behalf of his or her case, as Petitioner's counsel was doing in this case, without a reversal of the verdict adverse to said party partially caused by said improper, illegal, and highly prejudicial remarks of the Presiding Judge, it will "convert the judicial department of the government into an engine of oppression, and would make it destroy great constitutional safeguards." (*Hovey* vs. *Elliott*, 167 U. S. 409, 17 S. Ct. at page 845.)

If the trial Judge can withhold from the jury any of the issues of fact in any case in his discretion, as was done in this case in the many respects presented by Questions I, II, IV, and V in the Petition for Certiorari, a trial by a jury guaranteed by Amendment VII of the U. S. Constitution will become a tragic farce

and a great injustice to and useless sacrifice on the part of its victims.

If a litigant can be deprived of his or her property without due process of law, guaranteed by Amendment V of the U. S. Constitution, as was done to Petitioner in the particulars shown by her Petition for Certiorari and the record, this great document will cease to be of any benefit to the citizens for whose protection it was created and adopted after centuries of struggles and sacrifices by our Forefathers.

This Honorable Court is the last earthly bulwark for the protection of the liberty, justice, and security of every American citizen, and unless it exercises its power and jurisdiction by the grant of the Writ of Certiorari in this case, Petitioner will be deprived of her property in the amount of $250,000 without due process of law in violation of Amendment V, and without the kind of jury trial guaranteed to her by Amendment VII of the U. S. Constitution, and a precedent will be set which will be injurious to every other American now living, as well as future generations.

Article I, Section I, Paragraphs II and III of the Georgia Constitution of 1945 provide as follows:

> *Paragraph I.* "All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people, and at all times, amenable to them."
>
> *Paragraph II.* "Protection to person and property is the paramount duty of government, and shall be impartial and complete."

The same principles are contained in different language in the U. S. Constitution. The only way to pre-

serve these great and invaluable principles is to apply them in this case by granting the Writ of Certiorari to review and reverse the unjust, illegal, and unconstitutional decision of the Court of Appeals excepted to. There is no other earthly power which can grant Petitioner the justice to which she is entitled under the Constitution of our country. Petitioner, therefore, earnestly urges this Honorable Court to exercise its unquestionable power and duty by granting the Writ of Certiorari, and, after a hearing, reversing the unprecedented, unconstitutional, and grossly unjust decision and judgment rendered against her by the Court of Appeals.

In this connection, the Court's attention is again invited to its decision in the case of *Hodges* vs. *Easton*, 106 U. S. 412, 1 S. Ct. at pp. 310-11, holding in part as follows:

> "IT WAS THE PROVINCE OF THE JURY TO PASS UPON THE ISSUES OF FACT, AND IT WAS THE RIGHT of the defendants, SECURED BY THE CONSTITUTION OF THE UNITED STATES, TO HAVE THEM DO SO. That right could have been waived, BUT IT COULD NOT BE TAKEN FROM THEM BY THE COURT . . . THE COURT COULD NOT CONSISTENTLY WITH THE CONSTITUTIONAL RIGHT OF TRIAL BY JURY, submit a part of the facts to the jury, AND ITSELF, DETERMINE THE REMAINDER WITHOUT A WAIVER BY THE DEFENDANTS OF A VERDICT BY THE JURY. IN CIVIL CASES, other than those in equity and admiralty, and except where it is otherwise provided in bankruptcy proceedings, 'THE TRIAL OF ISSUES OF FACT' — 'IN THE CIRCUIT COURTS SHALL BE BY JURY,' UNLESS THE PARTIES, OR

THEIR ATTORNEYS OF RECORD, STIPULATE IN WRITING FOR THE WAIVER OF A JURY. . . . There is no such stipulation in this case, and there is nothing in the record from which such stipulation or waiver may be inferred. It HAS BEEN OFTEN SAID BY THIS COURT THAT THE TRIAL BY JURY IS A FUNDAMENTAL GUARANTY OF THE RIGHTS AND LIBERTIES OF THE PEOPLE. Consequently, every reasonable presumption should be indulged against its waiver. For these reasons the judgment below must be reversed."

Respectfully submitted,

G. SEALS AIKEN
Attorney for Petitioner.

BEN F. SWEET
of Counsel.

ACKNOWLEDGMENT OF SERVICE

Service is hereby acknowledged and copy received of the foregoing Petition for Rehearing.

This, the.....day of....., 1954.

Attorneys for Defendant.